MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

DOCKET NO. 75-242

DONALD K. GEARHEART and
RICHARD KURTZ,
PETITIONERS,

vs.

FEDERAL RESERVE BANK OF
CLEVELAND, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STANLEY M. CHESLEY
WAITE, SCHINDEL, BAYLESS
& SCHNEIDER
of Counsel

1318 Central Trust Tower
Cincinnati, Ohio 45202

FIELDING ATCHLEY
FIELDING ATCHLEY, JR.
ATCHLEY, ATCHLEY & COX

540 Pioneer Building
Chattanooga, Tennessee 37402

Attorneys for Petitioners

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
Table of Cases Cited	II
Statutes	III
Federal Rules of Civil Procedures	III
Publications	III
Petition for Writ of Certiorari	1
Jurisdiction of This Court	2
Issues Presented to This Court for Decision	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	12
Certificate of Service	13

APPENDIX

A — Opinion and Order of the United States District Court, Southern Distirct of Ohio, Western Division	1a
B — Opinion of the United States Court of Appeals for the Sixth Circuit	40a

TABLE OF CASES CITED

Page

American Communications Assns. CIO v. *Bouds*, 339 U. S. 382 (1950) 8

Burton v. *Wilmington Parking Authority*, 265 U. S. 715 (1961) 8, 11

Douglas v. *California*, 372 U. S. 353 (1964) 6

Harper v. *Virginia Board of Education*, 383 U. S. 663 (1966) 5

McDonald v. *Board of Election Commissioners*, 394 U. S. 802 (1969) 5

McLaughlin v. *Florida*, 379 U. S. 184 (1964) 6

Meredith v. *Allen County War Memorial Hospital Comm.*, 397 F.2d 33 (6th Cir., 1968) 8

Palmer v. *Columbia Gas of Ohio*, 479 F.2d 153 (6th Cir., 1973) 9

Public Utilities Comm. v. *Pollak*, 343 U. S. 451 (1952) 8

Reitman v. *Mulkey*, 398 U. S. 369 (1967) 8

Richardson v. *Belcher*, 404 U. S. 78 (1971) 6

Shapiro v. *Thomasson*, 394 U. S. 618 (1969) 6

Smith v. *Holiday Inns of America, Inc.*, 336 F.2d 650 (6th Cir., 1964) 8

STATUTES

	Page
12 C.F.R. Sec. 217.7 (Regulation Q)	2, 3
United States Code, Title 12, Section 371 (b)	2
United States Code, Title 12, Section 391 (b)	3
United States Code, Title 28, Section 1254 (1)	3
United States Code, Title 42, Sections 1983 and 1985	3
Constitution of the United States, Fifth and Fourteenth Amendments	2
Ohio Revised Code, Title XI	9, 10, 11

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12 (b) (6), Federal Rules of Civil Procedure	2

PUBLICATIONS

Michelman, *The Supreme Court, 1968 Term — Forward: On Protecting the Poor Through the Fourteenth Amendment,* 83 Harvard L.Rev. 7 (1969)	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

DOCKET NO. ————

IN THE MATTER OF:

DONALD K. GEARHEART and
RICHARD KURTZ,
PETITIONERS,

vs.

FEDERAL RESERVE BANK OF
CLEVELAND, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Your petitioners, Donald K. Gearheart and Richard Kurtz, pray for the issuance of writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the United States District Court, Southern District of Ohio, West-

ern Division, said District Court having dismissed petitioners' amended complaint under Rule 12 (b) (6) for failure to state a claim upon which relief could be granted, in contesting the constitutionality and legality of Regulation Q (12 C.F.R. § 217.7), which was promulgated, pursuant to 12 U.S.C. § 371 (b), by the Board of Governors of the Federal Reserve System on June 29, 1970.

JURISDICTION OF THIS COURT

Your named petitioners filed a class action complaint against the Board of Directors of the Federal Reserve System, Federal Reserve Bank of Cleveland, and six other Cincinnati banks, on September 14, 1973. On November 15, 1973, each defendant bank filed a separate motion to dismiss the complaint. On May 22, 1974, the District Court entered an order granting petitioners leave to file their amended complaint and to add additional parties requested, and granting defendants thirty days in which to request their motions to dismiss be refiled and directed to the amended complaint. The defendants then filed a request that their motions to dismiss be refiled, on July 15, 1974. On July 17, 1974 the District Judge entered an order dismissing the amended complaint, pursuant to Rule 12 (b) (6), for failure to state claims upon which relief could be granted, with an accompanying Memorandum Opinion, a copy of which is set out in Appendix A. On August 12, 1974, petitioners timely filed their Notice of Appeal to the Circuit Court of Appeals. On May 8, 1975, the United States Circuit Court of Appeals for the Sixth Circuit filed an opinion affirming the decision of the District Judge. A copy of this opinion is set out in Appendix B.

The jurisdiction of this Court is invoked under the Fifth and Fourteenth Amendments to the United States Consti-

tution, Title 12, U.S.C. Sec. 391 (b), 12 C.F.R. Sec. 217.7, Title 42 U.S.C. Secs. 1983 and 1985(3), and Title 28 U.S.C. Sec. 1254(1), giving this Court jurisdiction in certiorari cases.

ISSUES PRESENTED TO THIS COURT FOR DECISION

1. Does the amended complaint fail to state any claim or claims upon which relief can be granted?

2. Does the discrimination resulting to petitioners by the enforcement of Regulation Q violate their constitutional rights to due process and equal protection under the Fifth and Fourteenth Amendments?

3. Is the action of the respondent banks in selling to petitioners certificates of deposit of less than $100,000.00 taken under color of the law of Ohio?

STATEMENT OF THE CASE

From the year 1913 until June of 1970, the Federal Reserve Board, pursuant to its statutory authority, set the maximum interest rates allowed for certificates of deposit, regardless of the face amount of the certificate. In May, 1973, however, a substantial change in this practice by the Federal Reserve Board was made by the enactment of Regulation Q, which was promulgated in 12 C.F.R. Sec. 217.7. This amendment to Regulation Q continues to limit the interest which can be paid on certificates of deposit in amounts less than $100,000.00, but since May 22, 1973, places no limit on the rate of interest which can be paid on certificates of deposit of $100,000.00 or more. As a result, since May of 1973, respondent banks have paid substantially higher rates of interest on certificates of de-

posit in face amounts of $100,000.00 or more, regardless of maturity, than they paid to purchasers of certificates of deposit in face amounts of less than $100,000.00, or to depositors in savings accounts or other similar time deposits. Previously, and since June of 1970, the regulation had set no limit upon the rate of interest payable upon certificates of deposit of $10,000.00 or more, provided those certificates were of thirty-to-eighty-nine days' duration.

Following the enactment of this amendment to Regulation Q, petitioners, Donald K. Gearheart and Richard Kurtz, purchased certificates of deposit in the face amount of $10,000.00 from respondent Provident Bank. The petitioners allege that they and the class of individuals they represent who have purchased certificates of deposit in the face amount of less than $100,000.00, are denied a fair market rate of interest by the enforcement of Regulation Q on them, while, at the same time, no maximum rates or limits are set on time deposits of face value of $100,000.-00 or more; and that this denial operates to deprive petitioners and their class of depositors of their property without due process of law. Petitioners further allege that Regulation Q's imposition of maximum interest rates on deposits of face value less than $100,000.00, while not imposing such maximum interest rate limits on deposits of $100,000.00 or more, amounts to an insidious discrimination against the unwealthy, and constitutes a deprivation of petitioners' constitutional guaranty of equal protection of the laws.

The District Court concluded that the classifications presently employed by Regulation Q are rationally justified and, therefore, meet the necessary criteria to be held constitutional under the Fifth Amendment (pages 9 through 14, Opinion of the District Court). The Judge also held that petitioners' civil rights were not violated

(1) because there was no constitutional violation, and (2) because no state action was involved. (See pages 14 through 16 of District Court Opinion.)

REASONS FOR GRANTING THE WRIT

Your petitioners assign the following reasons for granting the writ:

I

THE CHANGES IN REGULATION Q SINCE JUNE OF 1970 CREATE BLATANT AND ARBITRARY DISCRIMINATION WHICH IS BASED SOLELY ON WEALTH AND THE ABILITY TO PAY, AND THUS IS A SUSPECT CLASSIFICATION WHICH COULD NOT MEET THE CRITERIA OF CONSTITUTIONALITY SET UP BY THIS COURT; THUS REGULATION Q IS VIOLATIVE OF PETITIONERS' CONSTITUTIONAL RIGHTS.

This Honorable Court has established that wealth is a suspect classification. The Court's newly-developed criteria for suspect classification of fundamental rights is set forth in the case of *McDonald* v. *Board of Election Commissioners,* 374 U.S. 802, 807 (1969), and Chief Justice Warren stated that classifications which might invade or restrict fundamental rights must be closely scrutinized and carefully confined. Citing *Harper* v. *Virginia Board of Education,* 383 U.S. 663 (1966), Chief Justice Warren further expounded that careful examination is especially warranted where lines are drawn on the basis of wealth or race. These are two factors which independently ren-

der a classification highly suspect and demand a more exacting judicial scrutiny. [*Douglas* v. *California*, 372 U.S. 353 (1964); *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964).]

In *Harper*, the court held that an indigent could not be deprived of his right to vote because of his inability to pay a poll tax. In *Douglas*, the court held that all indigents must be provided with access to legal counsel to aid in the preparation of criminal appeals. The court's description of wealth as a suspect classification assures that the poor will have special protection of the courts, so that they will be guarded from exploitation of their basic constitutional rights, including the right to use their property free from the insidious discrimination which a concentrated economic monopoly is able to impose upon groups whose limited economic means deprive them of equal bargaining position. [Michelman, *The Supreme Court, 1968 Term — Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harvard L.Rev. 7, 20, 21 (1969).]

Since wealth is a suspect classification, then it must be tested by the criteria set forth by the court for suspect classifications. This test is found in the case of *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971). This test provides that a regulation is not violative of constitutional right, (1) if there is a rational and justified basis for its enactment, and (2) it does not result in insidious discrimination. The failure of a regulation to pass either part of this test will result in its unconstitutionality. This fact is shown by the case of *Shapiro* v. *Thomasson*, 394 U.S. 618 (1969), in which case the court held that a state may not accomplish a valid purpose by creating insidious distinctions between classes of its citizens.

Regulation Q admittedly sets up different classifications, and thus automatically creates discrimination. The re-

sult of the amendments to the regulation is to leave wealthy people free to negotiate extremely high interest rates with defendant banks, while leaving the poor and middle-class citizens, as petitioners, bound by the established maximum rates. It is this establishment of regulations for the poor and middle-class persons and the abolishment of regulation for the affluent and those having greater or superior negotiating power that makes the discrimination blatant and arbitrary.

Since Regulation Q discriminates on the basis of wealth, then it must be applied to the two-pronged test as set forth in the *Richardson* case. Thus, Regulation Q can be constitutionally upheld only if there is a rational and justified basis for its enactment and it does not result in insidious discrimination. The learned District Judge and the Circuit Court of Appeals considered only the question of whether Regulation Q had a rational basis. However, as shown here, even if Regulation Q does have a rational basis, it still remains violative of the Constitution, as it creates insidious discrimination based on wealth.

Petitioners respectfully show the Court that the effect of the abolishment of regulation of interest rates for the affluent creates a situation whereby the less affluent, as petitioners, cannot receive a fair and proportionate rate on their money, and whereby the very affluent are able to demand sufficiently greater sums and receive inproportionate income for the use of their money. The admitted discriminating classifications of Regulation Q from 1913 to 1970, though perhaps valid in themselves, became blatant and insidious at the time the regulations were completely removed for purposes of certificates of deposit over $100,000.00. The degree of discrimination was changed to such a point that Regulation Q could no longer meet and pass the necessary constitutional criteria as set by this Court.

II

NOT ONLY DOES REGULATION Q, AS AMENDED, VIOLATE THE CONSTITUTIONAL AMENDMENT, AS SHOWN ABOVE, BUT THE ACTION OF RESPONDENT BANKS IN SELLING CERTIFICATES OF DEPOSIT PURSUANT TO THIS REGULATION INVOLVE THE STATE OF OHIO TO SUCH A SIGNIFICANT EXTENT AS TO BRING THE ACTION OF THE BANKS UNDER COLOR OF STATE LAW.

Conduct abridging individual rights does constitute action under color of state law if "to some significant extent the state, in any of its manifestations, has been found to have become involved in it." This recognized guideline is set forth by the Supreme Court in the case of *Burton* v. *Wilmington Parking Authority,* 265 U.S. 715, 722 (1961). This Honorable Supreme Court has consistently held that state action is present when the defendant is subject to substantial governmental regulation. [*American Communications Assns. CIO* v. *Bouds,* 339 U.S. 382 (1950); *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451 (1952).] The same conclusion is reached when the defendant is acting in accordance with direct governmental authorization or encouragement. [*Reitman* v. *Mulkey,* 398 U.S. 369 (1967).] Even when the state is not directly involved with a particular activity complained of, the involvement of the state may pervade so many of the defendant's activities that all of its activities can be considered to be taken "under color of state law." [*Smith* v. *Holiday Inns of America, Inc.,* 336 F.2d 650 (6th Cir., 1964); *Meredith* v. *Allen County War Memorial Hospital Comm.,* 397 F.2d 33 (6th Cir., 1968).]

In the *Burton* case, a private restaurant which discrimi-

nated against a negro was held to have acted under color of state law, because the restaurant rented a portion of a building owned and operated by an agency of the State of Delaware. In the *Reitman* case, state action was involved simply because legislative action authorized private discrimination and thus made the state at least a partner in the instant act of discrimination.

The critical factor is that the defendant banks are the subject of pervasive state regulation. When an individual or corporate entity is subject to pervasive regulation, its actions are considered actions taken under color of state law, regardless of whether that particular action is or is not taken in accordance with a regulation or statute [*Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (6th Cir. 1973).]

The defendant state bank corporations are created, organized, governed and conducted in accordance with the provisions of general corporate law of the State of Ohio. Furthermore, and more importantly, the five defendant state banks and, in most instances, the defendant First National Bank, are subject to provisions of the Ohio Revised Code which particularly regulate banks and their activities. Provisions of Title XI of the Ohio Revised Code, including Chapter 1101, include general provisions regulating banks, foreign banks (§ 1101.05), record keeping (§ 1101.-07), and retention of banking records (§ 1101.08). Chapter 1103 of the Ohio Revised Code regulates the organization of the defendant banks, including their articles of incorporation (§ 1103.02), their corporate existence (§ 1103.-08), their code of regulations (§ 1103.10), and provides for examination, notice and certification of articles by the superintendent of banks (§ 1103.07) and for examination upon certification that capital is fully paid (§ 1103.11). Chapter 1105 sets out strict and detailed regulations for the amount and management of capital funds, including

the minimum capital (§ 1105.02), regulation of capital securities (§ 1105.05), regulations concerning preferred stock (§ 1105.06), and includes regulations concerning preemptive rights (§ 1105.09) and voting by shareholders (§ 1105.10).

Chapter 1107 of the Ohio Revised Code sets out in considerable detail the corporate powers which are possessed by a bank, including general corporate powers (§ 1107.02), the holding of real estate (§ 1107.05) and deposits (§ 1107.06), the maintaining of safes, vaults, safe deposit boxes, and night depositories (§ 1107.09), general lending powers (§ 1107.12), margin requirements (§ 1107.13), investments in securities (§ 1107.16), regulations concerning real estate loans (§ 1107.19) and other loans secured by real estate (§ 1107.20), regulations concerning the power of a bank to borrow (§ 1107.25), letters of credit (§ 1107.29), miscellaneous and incidental banking powers (§ 1107.34), and the powers of bank subsidiary corporations (§ 1107.35).

Chapter 1111 sets out the regulations which the defendant banks must follow in establishing branch offices (§ 1111.03), including intermittent branches (§ 1111.04). All of the defendant banks maintain branch offices and are subject to the regulations of this chapter.

Chapter 1113 establishes the procedure for the liquidation of a bank, including the powers of superintendents (§ 1113.05), the appraisal of assets (§ 1113.07), dividends (§ 1113.12), and the disposition of books, papers, contents of safes, vaults and safe deposit boxes (§§ 1113.14 and 1113.15).

Chapter 1115 is a series of pervasive regulations defining and limiting the powers of the directors and officers of the defendant banks; § 1115.03 establishes the qualifications for directors, and § 1115.06 provides for their personal liability

in the case of a knowing violation of the chapters in Title 11.

Chapter 1117 sets forth regulations concerning cash dividends (§ 1117.02), stock dividends (§ 1117.03), dividends on retirement of preferred stock (§ 1117.04), and a requirement that no dividend may be declared or paid unless the bank will retain a surplus amounting to not less than twenty percent of its capital (§ 1117.05).

Chapter 1129 defines certain offenses, such as misapplication of funds, wrongful certification of checks, false representations and false advertisement of capital, and provides penalties for these offenses (§ 1129.99).

These provisions constitute a total and pervasive regulation scheme which controls virtually every aspect of the defendant banks' operation. All of the above statutes pertain to all of the defendant banks with only a few exceptions in the case of First National Bank, by virtue of its national charter. Based on this regulatory scheme, which controls virtually every aspect of defendant banks' operations, it is clear that there is a highly significant contact between the actions of the banks and the law of the State of Ohio. This significant nexus is sufficient to bring each bank's action in selling certificates of deposit under color of the law of the State of Ohio. Such a conclusion, petitioners contend, is consistent with the leading case of *Burton* v. *Wilmington Parking Authority*. Thus, petitioners contend that the learned District Judge and Circuit Court of Appeals reached an erroneous conclusion and improperly dismissed petitioners' claims under federal civil rights statutes.

CONCLUSION

Wherefore, for the reasons set out above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted, and that the judgment of the Circuit Court of Appeals, Sixth Circuit, and the opinion and judgment of the United States District Court should be reversed, and that Regulation Q, as amended, should be declared violative of petitioners' constitutional rights, and that this cause be remanded to the lower courts with directions to grant your petitioners relief appropriate, pursuant to this ruling of the Court.

Respectfully submitted,

STANLEY M. CHESLEY
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
of Counsel
1318 Central Trust Tower
Cincinnati, Ohio 45202

FIELDING ATCHLEY
FIELDING ATCHLEY, JR.
ATCHLEY, ATCHLEY & COX
540 Pioneer Building
Chattanooga, Tennessee 37402
Attorneys for Petitioners

APPENDICES

APPENDIX A

SOUTHERN DISTRICT OF OHIO
UNITED STATES DISTRICT COURT
WESTERN DISTRICT

No. 8950

OPINION

(Filed July 17, 1974)

DONALD K. GEARHEART,
RICHARD KURTZ

Plaintiffs,

v.

FEDERAL RESERVE BANK OF CLEVELAND,
FEREDAL RESERVE BANK BOARD,
FIRST NATIONAL BANK OF CINCINNATI,
FIFTH THIRD BANK,
CENTRAL TRUST COMPANY,
PROVIDENT BANK,
SOUTHERN OHIO BANK,
NORTHSIDE BANK AND TRUST CO.,

Defendants.

PORTER, J.:

In this action plaintiffs, each purchasers of a $10,000 certificate of deposit from defendant Provident Bank, sought in their original complaint to maintain a class action on behalf of all members of the general public who purchased certificates of deposit in face amounts of less than $100,000 for each certificate, or who have savings account deposits or other similar time deposits of less than $100,000 with defendant banks.

In their original complaint, plaintiffs named as defendants the Federal Reserve Bank of Cleveland, The Federal Reserve Bank Board, The First National Bank of Cincinnati, The Fifth Third Bank, The Central Trust Company, The Provident Bank, and The Northside Bank and Trust Company.

The original complaint set forth the following purported cause of action.

Fifth Amendment Claim

Plaintiffs allege that defendant Federal Reserve Board issued Regulation Q (12 C.F.R. § 217) which regulates the amount of interest paid to persons who deposit in savings accounts or other similar time deposits and who purchase certificates of deposit. Under Regulation Q, the amount of interest paid to depositors on time deposits or savings accounts or certificates of deposit of less than $100,000 is strictly limited. The regulation places no limit on the amount of interest defendant banks may pay to depositors who purchase certificates of deposit in face amounts of $100,000 or more. Since 1970 the defendant banks, in compliance with Regulation Q, have paid substantially higher rates of interest to purchasers of certificates of

deposit with face amounts of $100,000 and with a maturity of less than 90 days than they pay to purchasers of certificates of deposit in face amounts of less or to depositors in savings accounts or similar time deposits. Since May 22, 1973, the defendant banks have paid substantially higher rates of interest on certificates of deposit in face amounts of $100,000 regardless of maturity than they pay to purchasers of certificates of deposit with face amounts of less than $100,000 or to depositors in savings accounts or other similar time deposits.

Plaintiffs claim that the payment of higher interest rates to holders of certificates of deposit of $100,000 or more, when compared with the limitation on interest rates paid to depositors in savings accounts or other time deposits of lesser amounts constitutes a taking of plaintiffs' property without due process of law. It is their position that Regulation Q operates to deny them a "fair market rate of interest" without due process of law.

Civil Rights Claim — 42 U.S.C. § 1983

It is plaintiffs' position that the action of the defendant Federal Reserve Board in promulgating Regulation Q, and the action of the defendant banks in complying with that regulation amounts to a deprivation of their property (fair market rate of interest) without due process of law.

Civil Rights Claim — 42 U.S.C. § 1985(3)

Here plaintiffs claim that the action of all defendants amounts to a conspiracy to deprive them of equal protection of the laws or of equal privileges and immunities under the laws.

Securities Laws Claims

Plaintiffs here claim that certificates of deposit, savings accounts, and other time deposits are securities. They allege that the defendant banks have offered to sell and have sold certificates of deposit by the use of means or instruments of transportation or communication in interstate commerce or by the mails, by means of communications or of a prospectus which omitted to state a material fact necessary to make the statements, in the light of the circumstances under which they were made, not misleading. It is alleged that defendant banks were aware of the omission and that the fact omitted was that the banks pay substantially higher interest rates to investors who purchase certificates of deposit in face amounts of $100,000 or more. These facts are purported to state cause of action under § 12 (2) of the Securities Act of 1933, 15 U.S.C. § 771 (2); § 17 (a) of the Securities Act of 1933, 15 U.S.C. § 77q (2); and Rule 10b-5, 15 C.F.R. § 240, issued under § 10b of the Securities and Exchange Act of 1934.

In an attempt to state a cause of action against defendants Federal Reserve Board and Federal Reserve Bank of Cleveland under the Securities Laws, plaintiffs alleged in ¶ 29 of their original complaint that:

> "The Defendant Federal Reserve Board and the Defendant Federal Reserve Bank of Cleveland *collaborated with* and *aided and abetted* the Defendant banks, *under such circumstances as to establish liability to the Plaintiffs* and the members of the class which they represent, in aiding and abetting the Defendant banks in the violations of the securities laws of the United States." [Emphasis added.]

Antitrust Claims

The allegations purporting to set forth causes of action for violations of the antitrust laws are set forth below as they appear in the original complaint.

"30. The concerted action of Defendants as reflected in the special facts surrounding discriminatory interest rates constitutes a conspiracy in restraint of trade in such a way as to cause the Defendants to be liable to Plaintiffs and to the members of the class which they represent under 15 U.S.C. § 1.

31. The concerted action of Defendants as reflected in the special facts surrounding discriminatory interest rates constitutes an unlawful attempt to monopolize and an unlawful monopolization in such a way as to make the Defendants liable to Plaintiffs under 15 U.S.C. § 2.

32. The Defendants have entered into contracts, combinations or conspiracies in restraint of trade in such a way as to make Defendants liable to Plaintiffs under 15 U.S.C. § 3.

33. The discriminatory interest rates and terms and conditions for certificates of deposit, savings accounts, or other time deposits, constitute unlawful discrimination in such a way as to cause Defendants to be liable to Plaintiffs under 15 U.S.C. § 13."

As relief for the wrongs purportedly alleged, plaintiffs request:

"1. A declaration that, as a matter of law, the practices of the Defendant banks which involve the payment of substantially higher rates of interest to investors who purchase $100,000.00 certificates of deposit than interest rates paid to Plaintiffs and the members of the class which they

represent, and the policies of the Defendant Federal Reserve Bank Board and Federal Reserve Bank of Cleveland as applied by the Defendant banks, constitute an unlawful taking of the Plaintiffs' property without due process of law in violation of the Fifth Amendment, a violation of the securities laws of the United States, and a violation of the anti-trust laws of the United States.

2. An order that requires the Defendant banks to give a detailed accounting of the amounts and rates of interest paid by the Defendant banks to the Plaintiffs and the members of the class which they represent, and for a judgment in such amount on behalf of the Plaintiffs and the members of the class which they represent, to award to the Plaintiffs and the members of their class an amount necessary to give them a rate of return on their investments in certificates of deposit and in savings accounts or in similar time deposits with the Defendant banks equal to the rate of return paid to purchasers of certificates of deposit with face amounts of $100,000.00 at all times from 1970 to the date of the judgment and for a judgment award of triple damages.

3. An order enjoining the Defendants from continuing their unlawful practices as set forth in this Complaint in the future.

4. An award of attorneys' fees, costs of litigation and such other relief to which Plaintiffs may be entitled."

Defendants, First National Bank, Northside Bank and Trust Co., Fifth Third Bank, Provident Bank, Central Trust Co., and Southern Ohio Bank, have all filed motions to dismiss the complaint pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. Some of the defendants also moved for dismissal under Rule 12 (b) (1) urging that

the Court lacks subject matter jurisdiction. However, the basis for this latter ground for dismissal is that no cause of action is stated under the jurisdictional statutes for civil rights, securities, and antitrust claims. Accordingly, resolution of the 12 (b) (6) motion will also dispose of those under 12 (b) (1).

On May 22, 1974, this Court entered an order granting plaintiffs leave to file their amended complaint and to add the additional parties requested. In that order the Court gave defendants thirty days in which to request that their motions to dismiss be refiled and directed to the amended complaint, file other motions, answer, or otherwise plead to the amended complaint. Defendants have filed requests that their motions to dismiss be refiled and directed to the amended complaint and the Court grants these requests.

Constitutionality of Regulation Q

Because the answer to the question of whether Regulation Q and the action taken pursuant thereto by defendant banks is violative of plaintiffs' constitutional rights is also the answer to the question of whether certain of plaintiffs' state claims for which relief may be granted, and because the issue of the constitutionality of Regulation Q and of the banks' adherence thereto does not appear to be subject to clarification through the submission of evidence, that question is addressed first.

Plaintiffs' original complaint alleged that Regulation Q, as amended, by limiting the maximum rates of interest which can be paid on time deposits of face value under $100,000, thereby denying a "fair market rate of interest" to depositors of such amounts, while at the same time not so limiting maximum interest rates on time deposits of face value of $100,000 or more, operates to deprive de-

positors of amounts of less than $100,000 of their property (a fair market rate of interest on their deposits) without due process of law.

In plaintiffs' amended complaint it is also alleged that Regulation Q's imposition of maximum interest rates on deposits of face value less than $100,000, while not imposing such maximum interest rate limitations on deposits of $100,000 or more, amounts to an invidious discrimination against the "nonwealthy" and constitutes a deprivation of plaintiffs' constitutional guaranty of equal protection of the laws.

We begin our constitutional analysis of Regulation Q by noting that Congress unquestionably has the power to enact legislation providing for the regulation of interest rates paid on deposits by Federal Reserve System member banks. The powers of Congress in the fields of banking and commerce are firmly established. See, *M'Cullough* v. *Maryland,* 4 Wheat. 316 (1819); *The Farmers' and Mechanics' National Bank of Buffalo* v. *Dearing,* 91 U.S. 29 (1875); *Ex parte Yarborough,* 110 U.S. 651 (1884); *Champion* v. *Ames,* 188 U.S. 321 (1903); *Hippolite Egg Company* v. *United States,* 220 U.S. 45 (1911); *McDermott* v. *Wisconsin,* 228 U.S. 115 (1913); *Fahey* v. *Mallonee,* 332 U.S. 245 (1947). See also, *Nebbia* v. *New York,* 291 U.S. 502 (1934); *California Auto Ass'n.* v. *Maloney,* 341 U.S. 105, 110 (1951).

In the exercise of that power, Congress enacted 12 U.S.C. § 371b which currently provides in pertinent part:

> "The Board may from time to time, after consulting with the Board of Directors of the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board, prescribe rules governing the payment

and advertisement of interest on deposits, including limitations on the rates of interest which may be paid by member banks on time and savings deposits. The Board *may prescribe different rate limitations* for different classes of deposits, *for deposits of different amounts* or with different maturities or subject to different conditions regarding withdrawal or repayment." (Emphasis added.)

In accordance with this grant of authority, the Board of Governors of the Federal Reserve System promulgated that portion of Regulation Q, 12 C.F.R. § 217.7, of which plaintiffs complain. § 217.7, as it appeared subsequent to the Board's 1970 adjustment of interest rates, 35 Fed. Reg. 10501, June 27, 1970, reads as follows:

§ 217.7 Maximum rates of interest payable by member banks on time and savings deposits.

Pursuant to the provisions of section 19 of the Federal Reserve Act and § 217.3, the Board of Governors of the Federal Reserve System hereby prescribes the following maximum rates[1] of interest per annum payable by member banks of the Federal Reserve System on time and savings deposits:

(a) *Single maturity time deposits — (1) Deposits of $100,000 or more.* No member bank shall pay interest on any single maturity time deposit of $100,000 or more at a rate in excess of the applicable rate under the following schedule:

Maturity	*Maximum percent*
30-89 days	No maximum presently prescribed.
90-179 days	6¾
180 days or more but less than 1 year.	7
1 year or more	7½

(2) *Deposits of less than $100,000.* No member bank shall pay interest on any single maturity time deposit of less than $100,000 at a rate in excess of the applicable rate under the following schedule:

Maturity	*Maximum percent*
30 days or more but less than 1 year	5
1 year or more but less than 2 years	5½
2 years or more	5¾

(b) *Multiple maturity time deposits.* No member bank shall pay interest on a multiple maturity time deposit at a rate in excess of the applicable rate under the following schedule:

Maturity intervals	*Maximum percent*
30 days or more but less than 90 days	4½
90 days or more but less than 1 year	5
1 year or more but less than 2 years	5½
2 years or more	5¾

(c) *Savings deposits.* No member bank shall pay interest at a rate in excess of 4½ percent on any savings deposit.

[Reg. Q. 35 F.R. 1156, Jan. 20, 1970, as amended at 35 F.R. 4236, Mar. 10, 1970; 35 F.R. 1050[1], June 27, 1970]

---

[1] The limitations on rates of interest payable by member banks of the Federal Reserve System on time and savings deposits, as prescribed herein, are not applicable to any deposit which is payable only at an office of a member bank located outside the States of the United States and the District of Columbia.

On May 24, 1973, the limitations on maximum interest rates payable on certificates of deposit having face values of $100,000 or more and maturities of ninety days or more

were removed. Accordingly, since May 24, 1973, there have been no limitations upon the maximum interest rates payable on single maturity time deposits of $100,000 or more. Limitations remain on deposits of under $100,000, savings deposits, and multiple maturity time deposits.

We reject plaintiffs' contention that 12 U.S.C. § 371b involves an unconstitutional delegation of legislative power. The delegation of power involved in the main case upon which plaintiffs rely, *A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), has been described as "the most sweeping delegation of all time." Davis, Administrative Law Text, 1959, p. 38. The delegation of authority involved in 12 U.S.C. § 371b is much more limited, and, dealing as it does with banking, is similar in nature to that upheld in *Fahey* v. *Mallonee*, 332 U.S. 245 (1947). As such, precise standards are unnecessary and the imposition of such precise standards could impair flexibility needed for proper implementation of sound montetary policy.

We pass then to the question of whether Regulation Q is invalid as violative of plaintiffs' substantative due process and Fifth Amendment Equal Protection rights.

At the outset we note that a higher or "fair market rate of interest" is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment that the Supreme Court has come to regard as fundamental and to demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. See, *Shapiro* v. *Thomson*, 394 U.S. 618, 638 (1969). Compare, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Dunn* v. *Blumenstein*, 405 U.S. 300 (1972); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Loving* v. *Virginia*, 388 U.S. 1 (1966). Neither

does the classification employed by Regulation Q touch upon what has been said to be the suspect criteria of race, nationality or alienage. See, *Graham* v. *Richardson,* 403 U.S. 365, 375 (1971). Rather the regulation of the maximum interest rates which may be paid to depositors and purchasers of certificates of deposit by member banks of the Federal Reserve System is in the area of economics and social welfare. See *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488 (1955 (; *Railway Express Agency* v. *New York,* 336 U.S. 106 (1949); *Goesart* v. *Cleary,* 335 U.S. 464 (1948); *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Dandridge* v. *Williams,* 379 U.S. 471, 484-485 (1970). This being so, the applicable standard, in measuring the propriety of the classification for the purposes of both substantive due process and Fifth Amendment Equal Protection, is that of rational justification. *Richardson* v. *Belcher, supra,* at 81; *Dandridge* v. *Williams, supra,* at 485-486. See also, *Williams* v. *Lee Optical Co., supra; Railway Express Agency* v. *New York, supra; United States* v. *Kras,* 411 U.S. 1 (1973) *

From the legislative history of 12 U.S.C. § 371b, we think it clear that the end sought to be achieved by granting the Federal Reserve Board authority to limit maximum interest rates on smaller time deposits, a principal source of home mortgage funds, and by the Board's setting of maximum interest rates for such deposits pursuant to the authority granted was the elimination of destructive competition for deposits between banks and thrift institutions such as savings and loan associations and the regulation of

---

* A classification adopted by a regulatory agency is tested under the same standard and entitled to the same presumption of validity as a congressional enactment. *Grand Trunk Western Ry.* v. *Railroad Comm.,* 221 U.S. 400 (1911); 2 Am. Jur. 2d Administrative Law § 298.

the flow of deposits to thrift institutions in the interest of encouraging home building and protecting the home mortgage market. See 1966 U.S. Code, Cong. § Admin. News, p. 2966, 2998-3000; 1968 U.S. Code, Cong. & Admin. News, p. 3588; 1971 U.S. Code, Cong. & Admin. News, p. 1048. In this connection it should be noted that the Federal Reserve Board is required to consult with the Board of Directors of the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board before imposing, changing, or removing limitations on maximum interest rates payable by member banks. See, 12 U.S.C. § 371b; 1966 U.S. Code, Cong. & Admin. News, p. 2998. It should also be noted that savings and loan institutions, which historically place the bulk of their funds in home mortgages, are permitted to pay a higher rate of interest on smaller deposits to assist in attracting funds to the home mortgage market. See, 1971 U.S. Code, Cong. & Admin. News, p. 1048. Compare 12 C.F.R. § 217.7 (1973) with 12 C.F.R. §§ 526.1-526.6 (1973).

At the time the Federal Reserve Board was given authority to fix maximum interest rates payable by member banks on their deposits and to prescribe different rates of interest for different amounts, savings and loan associations and thrift institutions were thought to be at a disadvantage in competing with commercial banks for savings dollars. This competitive disadvantage was thought to be, to a large extent, a result of the thrift institution's inability to compete with commercial banks in terms of paying high interest rates on deposits. See, 1966 U.S. Code, Cong. & Admin. News, p. 2996.

When Regulation Q's limitations on the maximum interest rates payable by member banks on time deposits of under $100,000 is considered in light of its purpose and in the context of 12 U.S.C. § 371b's requirement that the

Federal Reserve Bank consult with the Federal Deposit Insurance Corporation and the Federal Home Loan Bank prior to taking any action, and keeping in mind that thrift institutions are permitted to pay a higher rate of interest on smaller deposits, it is clear that the limitation is rationally related to its purpose.

Regulation Q makes a distinction between time deposits of less than $100,000 and those of $100,000 or more. There are, at present, no limitations on the interest rates payable by member banks on time deposits of $100,000 or more. As was noted earlier, maximum rate limitations remain on time deposits of face value less than $100,000, on multiple maturity deposits, and on savings accounts.

Prior to the Board's removal in 1970 of maximum interest rate limitations on single maturity time deposits of $100,000 or more naving 30-to 89-day maturities, 35 Fed. Reg. 10501, all time deposits were subject to maximum interest rate limitations. Even then, however, the interest rate limitations imposed upon time deposits of $100,000 or more were higher than those imposed on deposits of less than $100,000. This allowance of the payment of a higher rate of interest on time deposits of $100,000 or more was in apparent recognition of the economic reality that such larger sums of money command higher rates of return. Accordingly, if commercial banks were to be competitive with alternative forms of investment in vying for large sum deposits, their interest rates would have to be higher than offered on smaller sums. An allusion to the economic reality above referred to is found in the Senate Report on the 1966 amendment of 12 U.S.C. § 371b, P.L. 89-597, wherein the Committee on Banking and Currency said:

> ". . . . The Board has informed the committee that lower ceilings were imposed on multiple-maturity

> deposits in an effort to differentiate between so-called consumer CD's and the larger denomination, money market CD, on which a ceiling of 5 percent would be unrealistic under present competitive conditions in domestic and international money markets." 1966 U.S. Code, Cong. & Admin. News, p. 2999.

The Federal Reserve Board, effective June 24, 1970, removed interest rate limitations on single maturity time deposits of $100,000 or more having maturities of 30 to 89 days. This action was taken shortly after the collapse of the Penn Central Railroad and at a time when financial markets were reacting to the crisis caused thereby. 56 Fed. Res. Bull. 613-614 (1970). The lifting of interest rate ceilings on large denomination deposits was intended to assist banks in obtaining funds to lend to businesses which were having difficulty refinancing their maturing obligations in the commercial paper market. Absent such lending, these companies would have faced liquidity crises. Speech of Arthur F. Burns to Joint Economic Committee of Congress, July 23, 1970, reprinted at 56 Fed. Res. Bull. 619, 624-25 (1970). In addition to this action, the Federal Reserve Board also used open market operations and the discount rate to provide needed liquidity. *Id.*, at 624.

On May 24, 1973, interest rate limitations were removed from all single maturity time deposits of $100,000 or more. 38 Fed. Reg. 13728 (1973). The purposes of this action were to promote stability by permitting bank issues of large denomination certificates of deposit to be of balanced maturities, 1973 C.C.H. Fed. Bank L. Rptr (Current) ¶ 95,944, and to help curb inflation by raising the borrowing rates through an increase in the cost to banks of obtaining funds for lending. Speech of Arthur F. Burns to Joint Economic Committee of Congress, Aug. 3, 1973, reprinted at 59 Fed. Res. Bull. 567, 571 (1973). At the same time,

the Federal Reserve Board established considerably higher reserve requirements for such deposits so as to discourage credit expansion. 1973 C.C.H. Fed. Bank L. Rptr. (Current) ¶ 95,944.

The goals sought to be achieved by the removal of limitations on single maturity time deposits of $100,000 or more are obviously legitimate goals. Averting situations such as the Penn Central collapse and curbing inflation are proper aims of sound monetary policy. Furthermore, the removal of such limitations is rationally related to the achievement of those goals.

We conclude from the foregoing that the classifications presently employed by Regulation Q are directed toward achieving legitimate ends and are rationally related to their achievement. Neither substantive due process nor Fifth Amendment Equal Protection requires more. See, *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971). Accordingly, we conclude that Regulation Q is constitutionally valid.

Civil Rights Claims — 42 U.S.C. § 1983

42 U.S.C. § 1983 provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is apparent from the wording of the statute that in order to state a claim for which relief may be granted, the facts alleged must show constitutionally cognizable

injury as a result of action taken under color of state law. See *Williams* v. *Rogers*, 449 F. 2d 513, 517 (8 Cir., 1971); *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963); *Long* v. *Parker*, 390 F. 2d 816, 819 (3 Cir., 1968); *Norton* v. *McShane*, 332 F. 2d 855, 862 (5 Cir., 1964); *Roots* v. *Callahan*, 475 F. 2d 751 (5 Cir., 1973); *Lung* v. *O'Cheskey*, 358 F. Supp. 928 (D. New Mexico, 1973), aff'd. 414 U.S. 802 (1973). See also cases cited in footnote 7 of *Williams* v. *Rogers, supra*, at p. 517.

While plaintiffs' amended complaint alleges that the actions of defendant banks about which they complain (paying a "fair market rate" of interest on certificates of deposit of face value of $100,000 or more while limiting the maximum rates paid on certificates of less than $100,000) were taken under color of both state and federal law, and while plaintiffs' memo in oposition to defendants' motions to dismiss points out that much of defendant banks' activity is regulated by the State of Ohio, it is nonetheless clear from the factual allegations of both plaintiffs' original and amended complaint and from 12 C.F.R. § 217.7 and 12 C.F.R. § 217.3 (a) that the actions about which plaintiffs complain were taken pursuant to federal, rather than state, law. Accordingly, the motions of defendant banks to dismiss plaintiffs' claim made under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted are well taken and are therefore granted.

An additional reason exists for dismissing plaintiffs' claim under 42 U.S.C. § 1983 which is also applicable to and requires dismissal of plaintiffs' claim under 42 U.S.C. § 1985 (3).

When the vague, conclusory and factually unsupported allegations of combined and concerted action, purposeful and invidious discrimination, and ". . . actions taken by defendant banks to aid and encourage the Defendant Board

of Directors of the Federal Reserve System to promulgate regulations discriminatory in intent and design . . ." are disregarded, *Place* v. *Sheppard*, 446 F. 2d 1239 (6 Cir. 1971); *Homan Manufacturing Co.* v. *Russo*, 233 F. 2d 547, 555 (6 Cir., 1955); *Sexton* v. *Barry*, 233 F. 2d 220 (6 Cir., 1956), cert. den., 352 U.S. 870 (1956), plaintiffs' complaints allege that the defendant banks complied with Regulation Q's requirements as to the payment of maximum interest rates on deposits of less than $100,000 and as to the regulation's removal of limitations on single maturity time deposits of $100,000 or more. In view of our previous determination that Regulation Q violates neither plaintiffs' substantive due process nor their Fifth Amendment Equal Protection rights, we are of the opinion that compliance by defendant banks with that regulation does not involve a violation of plaintiffs' constitutional rights. Accordingly, since the facts alleged by plaintiffs' amended complaint do not allege actions by defendant banks amounting to a violation of plaintiffs' constitutional rights, no claim for which relief may be granted is stated under either 42 U.S.C. § 1983 or 42 U.S.C. § 1985(3). The motions of defendant banks to dismis plaintiffs' civil rights claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) are granted.

Securities Laws Claims

Plaintiffs have alleged that defendant banks have violated § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2), § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(2), and Rule 10b-5, 15 C.F.R. § 240, issued under § 10b of the Securities and Exchange Act of 1934 by offering for sale and selling by the use of communications or of a prospectus in interstate commerce or by the mails securities (certificates of deposit) which omitted to state a material

fact (the fact that single maturity time deposits of $100,000 or more were not limited as to the maximum interest rate payable thereon) necessary to make the statements, in light of the circumstances under which they were made not misleading.

It is clear from plaintiffs' amended complaint that plaintiffs in this action each purchased a certificate of deposit of $10,000 face value from defendant Provident Bank. All defendants except the Provident Bank move for dismissal of the securities claims on the basis that as to them plaintiffs are neither purchasers of securities as is required for standing to sue under the Securities Act of 1933, *Simmons* v. *Wolfson,* 428 F. 2d 455 (6 Cir., 1970), cert. den. 400 U.S. 999 (1971); *Greater Iowa Corp.* v. *McLendon,* 378 F. 2d 783, 790 (8 Cir., 1967), nor are they persons who had a clear interest in the securities, those issued by defendants other than the Provident Bank concerning which the defendants other than Provident allegedly failed to disclose a material fact. See, *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (2 Cir., 1952) as modified by *James* v. *Gerber Products Co.* 483 F. 2d 944 (6 Cir., 1973).

In opposing dismissal of their securities claims on the basis that they have no standing to sue, plaintiffs first argue that the rule announced in *Birnbaum,* purchaser-seller rule, has been eroded sufficiently to permit them to sue in this case. We are cited, however, to no authority for plaintiffs' position that a purchaser of securities from one defendant may sue, under either the Securities Act of 1933 or Rule 10b-5, another defendant with which he has no connection whatsoever on the basis of omissions of fact with respect to securities with which he has no connection. We conclude at least some connection must exist between the plaintiff who brings an action under either the Secur-

ities Act of 1933 or Rule 10b-5 and the securities concerning which an omission to state a material fact is alleged to have been made.

Plaintiffs' second argument as to why they have standing to sue defendant banks other than Provident on their securities laws claims is that their amended complaint sufficiently alleges a basis for joining these defendants as principals, participants, controlling persons, or aiders and abettors. Beyond the mere use of the words "principals, participants, controlling persons, or aiders and abettors," and vague reference to "advertising concertedly developed and employed by all defendants" there are no factual allegations upon which defendants other than Provident might be held liable for securities violations in connection with the certificates of deposit which plaintiffs purchased from Provident. We do not think the conclusory terms employed or the vague allegations of concerted activity are sufficient to set forth a claim upon which relief may be granted against defendants other than Provident. Simply stated, no connection is alleged between plaintiffs and the defendants other than Provident upon which standing to sue under the anti-fraud provisions of the 1933 Act or Rule 10b-5 may be held to exist.

Accordingly, plaintiffs' securities law violation claims should be, and they hereby are, dismissed as to all defendants other than Provident as failing to state a claim upon which relief may be granted.

All of the defendant banks move to dismiss plaintiffs' claims under the securities laws on the basis that the certificates of deposit which plaintiffs purchased from The Provident Bank do not constitute securities as that term is used in the relevant statutes and in Rule 10b-5.

For purposes of § 12 (2) and § 17 (a) of the Securities

Act of 1933, the term security is defined in 15 U.S.C. § 77b as follows:

> **§ 77b. Definitions**
>
> When used in this subchapter, unless the context otherwise requires—
>
> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warranty or right to subscribe to or purchase, any of the foregoing.

For purposes of Rule 10b-5, the term "security" is defined in 15 U.S.C. § 78c (10), as follows:

> (10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

As defendants point out, certificates of deposit are nowhere listed in either definition. Defendants maintain that the absence of certificates of deposit from the listing indicates that Congress did not intend that they be covered. They refer to the following language in *S.E.C.* v. *The Fifth Avenue Coach Line,* 289 F. Supp. 3 (S.D.N.Y., 1968), aff'd 435 F. 2d 510 (2 Cir., 1970) as supportive of their position:

> "What Krock did was to deposit $885,944.45 in Fifth's account in Worcester in October 1965. In May 1966 he helped himself to the entire proceeds of Fifth's certificate of deposit, amounting to $1,030,150 plus $20,131.95 more of Fifth's money consisting of interest on an entirely separate certificate of deposit. This transaction does not involve any "security." There was not even a note from Fifth to Krock for the $885,-944.45. The dealings between Krock and Fifth were oral, except for the reference to this loan in the minutes of September 26, 1965. This is purely an individual loan transaction. Although it involved a violation of Krock's fiduciary duty to Fifth, the court concludes that the 1933 and 1934 Acts were not intended to deal with such a situation." 289 F. Supp. 3, at 38.

Defendants also note that the Court in *Sup't of Ins.* v. *Bankers Life and Cas. Co.,* 300 F. Supp. 1083 (S.D.N.Y., 1969) held at page 1099 that certificates of deposit issued for cash do not fall within the category of "certificates of deposit for a security" as listed in the definitions of "security" used in the Securities Acts. It is also true that the Supreme Court, in reversing the Second Circuit Court of Appeals' affirmance on unrelated grounds, declined to express an opinion on whether the certificates of deposit involved constituted "securities" iwthin the meaning of that term in the 1934 Act. However, the trial court in

Bankers Life indicated, in dicta, that it felt that certificates of deposit issued for cash could be held to be securities under the securities laws. The Court said:

> The S.E.C., however, has taken the position that the antifraud provisions of the securities acts apply to deposit and share accounts in national banks. *See* 31 Fed.Reg. 16, 531, *reprinted in* CCH Fed.Sec.L.Rep. ¶ 77, 421 (1966-67 Transfer Binder).
>
> The Supreme Court, in Tcherepnin v. Knight, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967), held that withdrawable capital shares in a state-chartered savings and loan association were "investment contracts" and, consequently, constituted "securities" under the 1934 Act. The Court noted that the term "security" " 'embodies a flexible rather than a static principle * * *.' " 389 U.S. at 338, 88 S.Ct. at 554.
>
> Giving the definition of "security" this liberal reading, a certificate of deposit issued for cash by a bank could be considered the equivalent of an "evidence of indebtedness" and would be a "security" within the meaning of the 1933 Act.
>
> The 1934 Act, however, does not include the term "evidence of indebtedness" in the statutory definition. Conceivably, a certificate of deposit issued for cash by a bank might be deemed an "investment contract" or more likely a "note". 300 F. Supp., at 1099-1100.

Plaintiffs rely on language in *Tcherepnin* v. *Knight*, 389 U.S. 332, at 336, 338, which indicates that the term "security" as used in the Securities Acts is to be given a liberal interpretation to argue that the Court should hold certificates of deposit to be "securities."

We conclude this issue is inappropriate for resolution on a motion to dismiss. More information, probably coming from the taking of evidence concerning the nature of the certificates of deposit is needed. At this point we

have nothing more than the arguments of counsel and the limitations placed on interest rates by Regulation Q to go on. Before we may decide whether the certificates involved here are "notes," or "evidence of indebtedness" or "investment contracts," more should be known about their nature.

Defendants also move to dismiss the securities laws claims on the basis that, even assuming certificates of deposit to be securities, facts are not alleged, in either the original or amended complaint, from which it could be concluded that the fact alleged to have been omitted by defendants, that the defendants would pay a higher or market rate of interest on single-maturity certificates of deposit of face value $100,000 or more, was material to plaintiffs in their purchase of $10,000 certificates. The test used in determining whether omitted facts are material is "whether a reasonable man would have attached importance to the undisclosed facts in determining his choice of action in the particular transaction in question." *Arber* v. *Essex Wire Corporation,* 490 F. 2d 414, 418 (6 Cir., 1974); *S.E.C.* v. *Texas Gulf Sulpher Co.,* 401 F.2d 833, 849 (2 Cir., 1968). The test as applied to the case before the Court then is whether plaintiffs, acting as reasonable men, would have attached importance to the fact that defendants paid a higher or market rate of interest on single maturity time deposits of face value $100,000 or more in determining their choice of action with respect to the purchase of $10,000 certificates of deposit?

As defendants point out there are no allegations in either the original or amended complaint which would indicate that plaintiffs had the financial capability of purchasing single maturity time deposits of face value of $100,000 or more. Additionally, plaintiffs use of terms such as "the less wealthy," "non-wealthy individuals," and "individuals

who are less affluent" would seem to support an inference that plaintiffs lacked such financial capability. Accordingly, if the allegedly omitted fact could be important to plaintiffs, it would have to be important in their decision of whether or not to purchase a $10,000 certificate rather than whether to purchase a $10,000 certificate or a $100,000 certificate.

There are many factors which a reasonable man would want to consider before investing $10,000 in a certificate of deposit. He would want to know how the rate of return on the certificate compares with the rates of return offered on alternative forms of investment. He would also want to know the relative security of his investment in a certificate of deposit as compared with the security of such alternative form of investment. Another factor which a reasonable man might want to consider would be the ease and speed with which he could convert his investment into cash in the event of urgent cash needs. All of these factors would be of importance to the reasonable man in deciding whether or not to invest $10,000 in a certificate of deposit. However, we can perceive of no manner in which the interest rate paid on certificates of deposit of face value of $100,000 or more have any relevance much less importance, to a reasonable investor of $10,000. Accordingly, we think plaintiffs' complaint fails to state facts from which it could be concluded that the fact alleged to have been omitted in defendants banks' communications with plaintiffs was material. Since plaintiffs' securities acts claims require the omission of "material facts" and since it clearly appears from plaintiffs' amended complaint that the alleged omission could not have been "material," no claim is stated, based on the alleged omissions, upon which relief could be granted. Therefore, plaintiffs' securities acts claims which

allege the failure to state a "material fact" should be and hereby are dismissed.

In their amended complaint, plaintiffs make the following vague allegations of misrepresentation:

> "The Defendants further misrepresented to plaintiffs, and to all members of the class, in advertising concertedly developed and employed by all defendants, that the artifically low interest rates were the maximum allowed by law, when in fact such rates were given the color of law but within the Defendants' ability to control. . . ."

Their complaint goes on to state that these vague allegations establish liability under 15 U.S.C. § 77 1 (2).

There are two reasons why the above allegations fail to state a cause of action under § 77 1 (2)'s proscription of making untrue statements of material fact. First, Regulation Q clearly sets forth the maximum rate of interest payable by defendant banks. This regulation, until held invalid, has the force and effect of law. *Farmer* v. *Philadelphia Electric Co.*, 329 F. 2d 3 (3 Cir., 1967); *Lile* v. *S.E.C.*, 324 F. 2d 772 (9 Cir., 1963). Accordingly, if defendants indicated that the interest rates paid were the maximum allowed by law, the statement was not untrue when made. Second, it appears that 15 U.S.C. § 77c (a) (2) specifically exempts "any security issued or guaranteed by a bank" from the provisions of 15 U.S.C. § 77 1 (2). See parenthetical notation at 15 U.S.C. § 77 1 (2). Therefore, assuming the certificates of deposit to be securities issued by the bank, the banks would be exempt from liability under § 77 1 (2).

For the reasons above stated, the securities laws claims of plaintiffs, fail to state claims for which relief may be granted. They should be and therefore are hereby dismissed.

ANTITRUST CLAIMS

Claims under Sherman § 1, 15 U.S.C. § 1

Construing the proffered amended complaint in the light most favorable to plaintiffs and taking its allegations as true, *California Motor Transp. Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972); *Radiovich* v. *National Football League,* 352 U.S. 445 (1957), it alleges that the defendant banks conspired to, and did, fix uniform rates of interest payable by all defendant banks on certificates of deposit of less than $100,000 face value. It is also alleged that defendant banks conspired, in some unspecified manner, with the Federal Reserve Board to promulgate Regulation Q.

Defendants, in their motion to dismiss, maintain that under action in setting interest rates for certificates of deposit of less than $100,000 was taken pursuant to Regulation Q and is, accordingly, exempt from antitrust attack. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 136 (1961); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F. 2d 341 (9 Cir., 1969); *Palmer* v. *Thompson,* 403 U.S. 217 (1971). Further, it is their position that individual or collective attempts by defendant banks to influence the Federal Reserve Board to promulgate Regulation Q does not subject them to antitrust liability regardless of their motive in making such attempts.

To the extent that the actions of defendant banks in setting interest rates on certificates of deposit of less than $100,000 was mandated by Regulation Q, they are immune from antitrust liability. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra; Sun Valley Disposal Co.* v. *Silver State Disposal Co., supra; Parker* v. *Thompson, supra.*

It is also clear that defendant banks may, without in-

curring antitrust liability, either singly or in combination, urge the Federal Reserve Board to adopt regulations which are beneficial to them and which produce a restraint of trade or a monopoly. As the Supreme Court said in *Eastern Railroad Conference* v. *Noerr Motor Freight, supra,* at 135-136:

> We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below —that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co.* v. *United States,*[13] that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations."[14] *Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.*[15] These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.
>
> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an *attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.* [Emphasis supplied.]

---

[13] 221 U.S. 1, at 51-62.

[14] *Id.*, at 57.

[15] *United States* v. *Rock Royal Co-op.*, 307 U.S. 533; *Parker* v. *Brown,* 317 U.S. 341.

However, plaintiffs' complaint alleges that defendant banks did more than comply with the requirements of Regulation Q. Regulation Q prohibits the banks from paying interest rates on certificates of deposit of less than $100,000 in excess of stated maximums. The regulation does not require that they all pay the same rates. The amended complaint alleges that the defendant banks, through agreement, set their interest rates on certificates of deposit of less than $100,000 at the same level.

While these allegations of agreement among the defendant banks to fix interest rates on certificates of deposit of less than $100,000, and the fixing of interest rates thereunder, appear to state a claim for which relief may be granted, the claim should be dismissed for lack of subject matter jurisdiction.

15 U.S.C. § 15, the jurisdictional statute for anti-trust claims provides that:

> "Any person who shall be *injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor* in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy. . . ." [Emphasis added.]

Nowhere in plaintiffs' amended complaint is it alleged that the rate of interest which they receive on their certificates of deposit is less than the maximum permissible under Regulation Q. Plaintiffs merely assert that the interest rates paid by defendant banks on certificates of less than $100,000 are the same. Without a claim that the interest rates paid on plaintiffs' certificates are less than the maximum allowed by Regulation Q, there are no facts plead to indicate that the plaintiffs were injured by defendants' alleged agreement rather than the mandate of Regulation

Q. Accordingly, we find and/or conclude there is no claim that plaintiffs were injured by reason of anything forbidden in the antitrust laws, and without such a claim, this Court lacks subject matter jurisdiction.

Plaintiffs have also alleged that defendant banks condition the security of deposit insurance of the Federal Deposit Insurance Corporation upon acceptance of the fixed interest rates for nonwealthy investors. Plaintiffs claim this constitutes an illegal tie-in and subjects defendant banks to liability under § 1 of the Sherman Act.

"The usual tying arrangement forces a customer to take a product he does not want in order to secure one he does desire." See, Antitrust Developments 1955-1958, Supplement to Report of the Attorney General's National Committee to Study the Antitrust Laws, 1955, p. 105. See also, *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 330 (1962). For an illegal tying arrangement to exist, the tying and tied products must be distinct. See *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 559-560 (E.D.Pa., 1960); *Associated Press* v. *Taft-Ingalls Corp.,* 340 F. 2d 753, 762-63 (6 Cir., 1965); cert. den. 382 U.S. 820 (1965); *American Manufacturers Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.,* 388 F. 2d 272, 280 (2 Cir., 1967).

In their complaint, plaintiffs assert that Federal Deposit Insurance is the tying product and that fixed interest rates for nonwealthy depositors is the tied product. It should be sufficient to note that Federal Deposit Insurance does not exist in a vacuum. By its nature, it must be tied to a deposit. The fact that plaintiffs object to the interest rate paid by defendant banks on such deposits does not make Federal Deposit Insurance a distinct product. Accordingly, plaintiffs have not alleged an actionable claim

of an illegal "tie-in" under the antitrust laws. The "tie-in" claim should be and therefore is dismissed.

Section 2 of the Sherman Act, 15 U.S.C. § 2

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a misdemeanor. . . ."

The elements of the offense of monopoly under § 2 of the Sherman Act were set out in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) as follows:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. . . ." 384 U.S., at 570-71.

The allegations of plaintiffs' complaint purporting to state a claim under § 2 of the Sherman Act are:

"33. The Defendants have acted in concert to utilize the cloak of governmental authority of the Board of Directors of the Federal Reserve System in such a way as to deprive the Plaintiffs and the class which they represent of a fair market rate of interest on their investments by monopolizing the market in interest income to non-wealthy bank customers and depositors, by fixing the interest rates paid to such customers and depositors in that market, and by discriminating against them in the interest so paid. By paying an unreasonable and discriminatory rate of in-

terest to persons of less affluence, the Defendants have effectively restrained and inhibited trade and commerce among the several states and the District of Columbia and the territories of the United States, and have fixed the price of interest income for the non-wealthy depositor and non-wealthy bank customer, particularly in Cincinnati, Ohio area. The current fixed rate of interest for deposits of less than $100,000.00 is less than the current rate of inflation, a factor which further operates to the harm of those situated as are Plaintiffs. Further, Regulation Q itself is promulgated through the concurrence of all Defendants and as such constitutes an agreement in restraint of trade.

* * *

"35. The effect of the concert of the Defendants is a monopoly among the Defendants, and the actions thereunder are designed to and do constitute an unreasonable restraint of trade and commerce, particularly in that competition among them has been eliminated in all dealings involving certificates of deposit in face amounts of less than $100,000.00. This lessening of competition has had an adverse impact upon interstate commerce, as well as upon trade among the Defendant banks, and has caused serious injury to the Plaintiffs and the class which they represent. This lessening of commerce has caused economic harm both to the public at large as well as to the private economic situation of the Plaintiffs and the class which they represent and has produced excessive monopoly profits for the Defendant banks." (Amended Complaint, pp. 14, 15)

Construing these allegations in the light most favorable to plaintiffs, they appear to set forth the elements of the offense of monopolization as stated in *Grinnell, supra.* It was said in *Grinnell,* 351 U.S., at 391, that monopoly

power is "the power to control prices or to exclude competition." Plaintiffs' allegations that defendant banks, through agreement, fixed the interest rates paid to nonwealthy bank customers and depositors would seem to support inferences that the banks did have monopoly power in the relevant market – alleged to be the market in interest income to nonwealthy bank customers and depositors – and also that they had willfully acquired that power through the agreement to fix interest rates. However, this claim is subject to the same defect as is plaintiffs' Sherman § 1 price-fixing claim. That is, that since there is no claim that plaintiffs were paid an interest rate less than the maximum permissible by Regulation Q, there are no facts alleged by which it might be inferred that plaintiffs were injured in their business or property as a result of the alleged monopoly of defendants rather than by the limitations placed on maximum interest rates by Regulation Q. We conclude that plaintiffs have not alleged facts conferring subject matter jurisdiction upon this Court under 15 U.S.C. § 15.

Section 3 of the Sherman Act, 15 U.S.C. § 3

Section 3 of 15 U.S.C. provides:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any Territory or Territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any states or foreign nations is declared illegal. . . ."

This section merely extends the coverage of the prohibitions of § 1 of the Sherman Act to contracts, etc., in re-

straint of trade or commerce in any Territory of the United States or of the District of Columbia . . . etc. As such, it requires no separate discussion, since the discussion of Sherman § 1 claims applies.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a)

15 U.S.C. § 13 (a) provides in pertinent part:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different *purchasers of commodities of like grade and quality*, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and *where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them*: . . ." [Emphasis added.]

Plaintiffs claim that the payment of higher rates of interest for certificates of deposit of $100,000 or more by the defendant banks than they pay on deposits of less than $100,000 constitutes price discrimination prohibited by 15 U.S.C. § 13 (a).

Defendants move to dismiss on the basis that certificates of deposit do not constitute "commodities" as that term is used in 15 U.S.C. § 13 (a), and on the basis that their actions in paying different interest rates do not tend to lessen competition nor to create a monopoly. The latter

contention presents a question of fact not proper to resolve on a motion to dismiss. The issue of whether certificates of deposit are "commodities" within the meaning of that term in 15 U.S.C. § 13 (a), however, is a question of law properly resolved on motion. See *Bichel Optical Lab., Inc.* v. *Marquette Nat. Bank of Mpls.*, 336 F. 2d 1368 (D. Minn. 1971); *Baum* v. *Investors Diversified Services*, 409 F. 2d 872 (7 Cir., 1969); *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration*, 295 F. 2d 375 (7 Cir., 1961).

We are of the opinion that the purchase of a certificate of deposit from defendant banks does not constitute the purchase of a "commodity" within the meaning of 15 U.S.C. § 13 (a). A certificate of deposit is an intangible representing the issuer's promise to repay the amount tendered therefor, together with a set rate of interest, either upon a date certain or upon demand. The transaction involving the purchase of a certificate of deposit is, in reality, a loan of money to the bank in return for the bank's promise to repay the money, with interest, either upon a specified date or upon demand. The certificate of deposit is the embodiment of that promise. As such, it is an intangible and not within the meaning of "commodity" as used in 15 U.S.C. § 13 (a). See *Bichel Optical Lab., Inc.* v. *Marquette Nat. Bank of Mpls., supra*, at 1370-71; *La Salle Street Press, Inc.* v. *McCormick & Henderson, Inc.*, 293 F. Supp. 1004, 1005-1006 (N.D.Ill., 1968), rev'd on other grounds, 445 F. 2d 84, 95 (7 Cir., 1971); *Baum* v. *Investors Diversified Services, supra*, at 874-875.

Furthermore, the lending of money has been held not to constitute the *purchase* or *sale* of a "commodity" within the meaning of 15 U.S.C. § 13 (a). *Bichel Optical Lab., Inc.* v. *Marquette Nat. Bank of Mpls., supra*, at 1371. See

also, *United States* v. *Investors Diversified Services*, 102 F. Supp. 645, 647 (D. Minn., 1951).

Accordingly, we find that plaintiffs' claim of price discrimination under 15 U.S.C. § 13 (a) does not state a claim for which relief may be granted and defendant banks' motions to dismiss are well taken. The amended complaint should be dismissed with respect to this claim.

In summary, plaintiffs' claims under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, and their claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and Rule 10b-5 are dismissed for failure to state a claim upon which relief may be granted.

Plaintiffs' claims under § 1 of the Sherman Act, 15 U.S.C. § 1, alleging price-fixing, under § 2 of the Sherman Act, 15 U.S.C. § 2, alleging monopoly, and under § 3 of the Sherman Act, 15 U.S.C. § 3, are dismissed for lack of subject matter jurisdiction.

Plaintiffs' claims under § 1 of the Sherman Act alleging an illegal "tie-in," and under § 2 (a) of the Clayton Act, alleging price discrimination, are dismissed for failure to state a claim upon which relief may be granted.

Before concluding, it seems appropriate to make a couple of observations. One is that plaintiffs' counsel, with a resourcefulness we do not criticize, have asserted every available theory in an attempt to state a cause of action. Inevitably each theory was tested by a motion to dismiss for failure to state a claim upon which relief could be granted.

The decision of such motions took a lot of time. Most litigation invited by the desire to do good and/or gain the pot of gold at the end of the class action rainbow is complex in the extreme, and this case is typical on that score.

Query whether the work on this decision was needed in view of the recent holding of the Supreme Court in *Eisen* v. *Carlisle & Jacquelin,* — U.S. — (42 U.S.L.W. 4804, May 28, 1974). There the Court held that the express language and intent of Rule 23(c)(2) leaves no doubt that individual notice must be sent to all class members who can be identified through reasonable effort. This must be done by the "best notice practicable." We assume that, as in *Eisen,* in this case there would be nothing to show that individual notice could not be mailed to each of the persons who had savings accounts or certificates for less than $100,000 in the banks named as defendants herein. The expense of this would have to be borne by the plaintiffs under *Eisen,* and the probabilities are that the expense thereof would be prohibitive. Also, the expense of this litigation would not justify the named plaintiffs in pursuing it.

In retrospect, this Court should have made haste slowly on the pending motion and awaited the outcome of the appeal in the much-litigated *Eisen* case.

An appropriate order is being entered simultaneously with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. 8950

DONALD K. GEARHEART,
RICHARD KURTZ,

Plaintiffs,

v.

FEDERAL RESERVE BANK OF
CLEVELAND, et al.,

Defendants.

ORDER

(Filed July 17, 1974)

The Court finds well taken, and therefore grants the motions of defendants First National Bank of Cincinnati, Northside Bank and Trust Co., Fifth Third Bank, Provident Bank, Central Trust Company, and Southern Ohio Bank to dismiss the complaint and amended complaint pursuant to Rule 12 (b) (6) of the Fed. R. Civ. P., for failure to state claims on which relief can be granted.

There are also pending motions by some of the defendants for dismissal under Rule 12 (b) (1), urging that the Court lacks subject matter jurisdiction. However, the basis of such motions is that no cause of action is stated under the jurisdictional statutes for civil rights, securities and antitrust claims. Hence, resolution of the 12 (b) (6) motions also disposes of the 12 (b) (1) motions.

Such motions were refiled and directed to the amended complaint and, as so directed, the Court finds they are well taken and they are therefore sustained.

The Court concludes that the amended complaint cannot be further amended to state a civil rights claim, a securities claim, or an antitrust claim. It is therefore in order, and the Court does, dismiss the within cause of action. Such dismissal is with prejudice and at the plaintiffs' costs. So ordered.

/s/ DAVID S. PORTER
United States District Judge

APPENDIX B

No. 74-2156

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DONALD K. GEARHEART and RICHARD KURTZ,
Plaintiffs-Appellants,

v.

FEDERAL RESERVE BANK OF CLEVELAND,
FEDERAL RESERVE BOARD,
THE FIRST NATIONAL BANK OF CINCINNATI,
FIFTH THIRD BANK,
CENTRAL TRUST COMPANY,
PROVIDENT BANK,
SOUTHERN OHIO BANK,
NORTH SIDE BANK AND TRUST CO.,
ARTHUR F. BURNS, Chairman, Board of Directors of the Federal Reserve System,
GEORGE W. MITCHELL, Vice Chairman, Board of Directors of the Federal Reserve System.
J. DEWEY DANNE, Member, Board of Directors of the Federal Reserve System,

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

JEFFREY M. BUCHER, Member, Board of Directors of the Federal Reserve System,
ANDREW F. BRIMMER, Member, Board of Directors of the Federal Reserve System,
JOHN E. SHEEHAN, Member, Board of Directors of the Federal Reserve System,
ROBERT C. HOLLAND, Member, Board of Directors of the Federal Reserve System,

Defendants-Appellees.

Decided and Filed May 8, 1975.

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges.

PER CURIAM. Appellants bring this appeal from the District Court's dismissal of their class action against the Federal Reserve Board, each director of the Federal Reserve System, and six Cincinnati-area banks. Appellants, Donald K. Gearheart and Richard Kurtz, were purchasers of $10,000 certificates of deposit at the Provident Bank. Appellants, on behalf of all purchasers of certificates of less than $100,000 at Appellee bank, challenged the validity of Regulation Q promulgated by the Federal Reserve Board.

Regulation Q, 12 C.F.R. § 217.7, limits the interest which can be paid on certificates of deposit in amounts less than $100,000, but, since a May 22, 1973 amendment, places

no limits on the rate of interest which may be paid on certificates of deposit of $100,000 or more. The Regulation is challenged on numerous grounds. It allegedly denies equal protection to the poor, violates the Robinson-Patman Act, the antitrust laws, the federal securities laws and Sections 1983 and 1985 of the Civil Rights Acts.

The District Court in a well-reasoned thirty page opinion disposed of all the above arguments and found that Appellants had stated no cause of action for which relief could be granted.

Appellants seek strict scrutiny of Regulation Q, claiming that wealth is involved here and is a suspect classification. Receiving different rates of return on certificates of deposit of different amounts hardly can be regarded as a deprivation even approaching the magnitude of an alleged deprivation of freedom of speech or the right to vote. The District Court correctly concluded that the Regulation need only have a rational basis to withstand constitutional scrutiny. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973); *Richardson* v. *Belcher,* 404 U.S. 78 (1971). Regulating interest rates prevents unfair competition for savings accounts and helps to regulate the country's monetary flow. The regulation is rationally supported and thus withstands constitutional scrutiny.

Having concluded that Regulation Q is constitutional, we turn to the numerous alleged statutory violations. A necessary element of a civil rights claim pursuant to 42 U.S.C. §§ 1983 and 1985 is the violation of a constitutional right. No such violation has here been demonstrated and the District Court was correct in its dismissal of the civil rights claims.

Appellants argue that Appellee banks have violated various provisions of the Securities Act of 1933 and the Se-

curities and Exchange Act of 1934 by selling certificates without disclosing a material fact, namely the interest differential allowed by Regulation Q. The District Court noted that Appellants each purchased a $10,000 certificate from Appellee Provident Bank. The District Court properly concluded that Appellants thus lacked standing to sue banks other than Provident. *Simmons* v. *Wolfson,* 428 F.2d 455 (6th Cir. 1970), *cert. den.* 400 U.S. 999 (1971).

The District Court further concluded that Appellants failed to demonstrate the ability to take advantage of higher interest rates by purchasing $100,000 certificates and thus the District Court determined that disclosure of the disparity in rates for $100,000 certificates was not material to Appellants' purchase of $10,000 certificates. *Arber* v. *Essex Wire Corp.,* 490 F.2d 414 (6th Cir. 1974).

Appellants also advance a number of antitrust claims. Appellees complied with a valid federal regulation and antitrust laws are impliedly repealed to the extent they are inconsistent with comprehensive federal or state regulation of an industry. *See, e.g., Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973). Appellants also contend that actions in reliance on an unconstitutional regulation are not immunized from antitrust laws. Our conclusion that Regulation Q is constitutional obviates consideration of this contention.

We are also of the opinion that the District Court correctly found Appellants' monopoly and price discrimination claims to be without merit.

The District Court's dismissal of Appellants' claims is affirmed.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	6
I. The Court of Appeals Correctly Decided That Regulation Q Constitutes Social and Economic Regulation Which Rationally Serves Legitimate Ends and Is Therefore Constitutional	6
(A) Regulation Q Involves Neither a Suspect Classification Nor a Fundamental Right and Was Properly Tested Under the Rational Basis Test	7
(B) The Court of Appeals Correctly Applied the Rational Basis Test	9
II. The Standard for Determining "State Action" Which Petitioners Suggest Was Rejected by This Court During Its Last Term and There Is No Reason for the Court Again to Review This Question	11
CONCLUSION	14
ADDENDUM	17
AFFIDAVIT OF SERVICE	20

TABLE OF CASES

Dandridge v. Williams, 397 U.S. 471 (1970)	9, 10
Doe v. Bellin Mem. Hosp., 479 F.2d 756 (7th Cir. 1973)	13
Douglas v. California, 372 U.S. 353 (1964)	8

PAGE

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 8

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 13

Jackson v. Norton-Childrens' Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973) 13

McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) 8

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) .. 13

Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) 13

Richardson v. Belcher, 404 U.S. 78 (1971) 6, 9

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 7, 8, 9, 10

Schlib v. Kuebel, 404 U.S. 357 (1971) 7, 8, 10

Shapiro v. Thomasson, 394 U.S. 618 (1969) 8

Stinson v. Finch, 317 F. Supp. 581 (N.D. Ga. 1970) .. 12

United States v. Kras, 409 U.S. 434 (1973) 7, 8

Williams v. Rogers, 449 F.2d 513 (8th Cir. 1973) .. 12

OTHER AUTHORITIES
U. S. CONSTITUTION

U. S. Const. Amendment V 2, 4, 17

U. S. Const. Amendment XIV 2, 4, 17

STATUTES

Federal Reserve Act § 19(j), 12 U.S.C.A. § 371b (Supp. 1975) 2, 3, 17

Civil Rights Act of 1871, 42 U.S.C.A. §§ 1983, 1985 (1975) 2, 4, 12, 20

Act of September 21, 1966, Pub. L. 89-597, 80 Stat. 823 3

Act of October 15, 1973, Pub. L. 93-123, 87 Stat. 449 . 3, 4

REGULATIONS

PAGE

Regulation Q, Interest on Deposits, 12 C.F.R. § 217.7 (1974) 2, 18

31 Fed. Reg. 12676 (1966) 3

33 Fed. Reg. 6233 (1968) 3

35 Fed. Reg. 1156 (1970) 3

35 Fed. Reg. 10501 (1970) 3

38 Fed. Reg. 13728 (1973) 3

38 Fed. Reg. 18641 (1973) 3

38 Fed. Reg. 19908 (1973) 3

38 Fed. Reg. 20442 (1973) 3

38 Fed. Reg. 29461 (1973) 3

39 Fed. Reg. 43056 (1974) 3

39 Fed. Reg. 43618 (1974) 3

LEGISLATIVE HISTORY

Senate Report (Banking and Currency Committee) No. 1601, Sept. 14, 1966, 1966 U.S. Code Cong. & Adm. News (2) 2994-3001 (89th Cong. 2d Sess.) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-242

DONALD K. GEARHEART and
RICHARD KURTZ,

Petitioners,

v.

FEDERAL RESERVE BANK OF CLEVELAND,
FEDERAL RESERVE BOARD,
THE FIRST NATIONAL BANK OF CINCINNATI,
FIFTH THIRD BANK,
CENTRAL TRUST COMPANY,
PROVIDENT BANK,
SOUTHERN OHIO BANK,
NORTH SIDE BANK AND TRUST CO.,
ARTHUR F. BURNS, Chairman,
Board of Directors of the Federal Reserve System,
GEORGE W. MITCHELL, Vice Chairman,
Board of Directors of the Federal Reserve System,
J. DEWEY DANNE, Member,
Board of Directors of the Federal Reserve System,
JEFFREY M. BUCHER, Member,
Board of Directors of the Federal Reserve System,
ANDREW F. BRIMMER, Member,
Board of Directors of the Federal Reserve System,
JOHN E. SHEEHAN, Member,
Board of Directors of the Federal Reserve System,
ROBERT C. HOLLAND, Member,
Board of Directors of the Federal Reserve System,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS, THE FIRST NATIONAL BANK OF CINCINNATI, FIFTH THIRD BANK, CENTRAL TRUST COMPANY, PROVIDENT BANK, SOUTHERN OHIO BANK, AND NORTH SIDE BANK AND TRUST CO., IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The opinion of the District Court has not been reported. It appears as Appendix A in the Appendix to the Petition.

The opinion of the Court of Appeals for the Sixth Circuit has not been reported in official reports. It appears at 1975 CCH Trade Cases ¶ 60,328 and as Appendix B in the Appendix to the Petition.*

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved are the United States Constitution, Amendments V and XIV; the Federal Reserve Act of 1913, § 19(j), as amended, 12 U.S.C.A. § 371b (Supp. 1975), and Regulation Q of the Federal Reserve Board adopted thereunder, 12 C.F.R. § 217.7 (1975); and the Civil Rights Act of 1871, 42 U.S.C.A. § 1983. The pertinent text of each is set forth in the Addendum to this Brief at pages 17 through 21 hereof.

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly decide that, in order to protect the home mortgage market, assure liquidity for businesses, and otherwise implement the nation's monetary policy, it is constitutionally permissible for Congress to authorize and the Federal Reserve Board to prescribe limitations upon interest rates for bank deposits which limits vary with the amount on deposit?

2. Does the mandatory compliance of Respondent Banks with the federally adopted and federally enforced interest rate limitations constitute "state action" of the state of Ohio within the meaning of 42 U.S.C.A. § 1983?

STATEMENT OF THE CASE

In 1933, by amendment to the Federal Reserve Act of 1913, Congress empowered the Federal Reserve Board to

---

* Each opinion shall be referred to herein by citing the Appendix to the Petition and pertinent page thereof.

establish maximum rates of interest which member banks of the Federal Reserve System may pay on time and savings deposits. 48 Stat. 182. A further amendment adopted in 1966 authorized the Federal Reserve Board to "prescribe different rate limitations . . . for deposits of different amounts. . . ." 12 U.S.C.A. § 371b (Supp. 1975), Pub. L. 89-597, 80 Stat. 823. The legislative history reflects that the 1966 amendment was adopted to enhance the flexibility of the Federal Reserve Board in implementing the nation's monetary policy, protecting the funds available for home mortgage loans, and otherwise regulating the flow of funds within the economy. 1966 U.S. Code Cong. & Adm. News (2), 2994-3001 (89th Cong. 2d Sess.).

Pursuant to this statutory authority, the Federal Reserve Board has from time to time modified the interest rate limitations prescribed by Regulation Q to affect the flow of savings. 31 Fed. Reg. 12676 (1966); 33 Fed. Reg. 6233 (1968); 35 Fed. Reg. 1156 (1970); 35 Fed. Reg. 10501 (1970); 38 Fed. Reg. 13728 (1973); 38 Fed. Reg. 18641 (1973); 38 Fed. Reg. 19908 (1973); 38 Fed. Reg. 20442 (1973); 38 Fed. Reg. 29461 (1973); 39 Fed. Reg. 43056 (1974); 39 Fed. Reg. 43618 (1974).

As a part of this function, effective June 24, 1970, the Federal Reserve Board removed the interest limitations on certificates of deposit of $100,000 or more with maturities of thirty to eighty-nine days. 35 Fed. Reg. 10501 (1970). Thereafter, on May 24, 1973, the Federal Reserve Board lifted the interest ceiling on all single maturity certificates of deposit of $100,000 or more. 38 Fed. Reg. 13728 (1973).

The desirability of permitting higher interest on large denomination certificates of deposit was expressly recognized by Congress when it enacted the 1966 amendment. 1966 U.S. Code Cong. & Adm. News (2), at 2999. On the other hand, by joint resolution adopted on October 15, 1973, Congress has affirmed that the continued restriction of

interest payable on deposits of less than $100,000 is in the national interest:

> In carrying out their respective authorities under the Act of September 21, 1966 . . . the Board of Governors of the Federal Reserve System . . . shall take action to limit the rates of interest . . . which may be paid on time deposits of less than $100,000. . . . Pub. L. 93-123, 87 Stat. 449.

The Respondent Banks herein are each members of the Federal Reserve System. As such, each is forbidden from paying interest on deposits of under $100,000 in excess of the maximum rates established by Regulation Q.

Each Petitioner herein has purchased a $10,000 certificate of deposit from Respondent Provident Bank. Regulation Q establishes the maximum rate of interest which Provident Bank may pay on those certificates. Petitioners do not claim to be receiving less than the maximum.

Petitioners filed this purported class action on September 14, 1973.[1] Petitioners' Amended Complaint[2] asserts that the Respondent Federal Reserve Board's action removing interest limitations upon certificates of deposit of $100,000 or more, while maintaining interest limitations for smaller deposits, violates the rights of Petitioners and others having deposits of less than $100,000 to due process and equal protection of the laws. Petitioners assert, moreover, that Respondent Banks' compliance with the interest rate limitations of Regulation Q subjects these banks to liability under the Civil Rights Act of 1871, three antifraud

[1] The District Court did not rule upon whether this suit is maintainable as a class action. By letter dated July 16, 1974 to the parties the District Court expressed grave concern as to whether this suit could feasibly be maintained as a class action.

[2] On November 15, 1973, each Respondent Bank moved to dismiss the original Complaint. Before those motions were ruled upon, Petitioners tendered an Amended Complaint. With leave of court the motions to dismiss of Respondent Banks were deemed refiled and directed to the Amended Complaint. The discussion herein is limited to the Amended Complaint.

sections of the federal securities laws, and four separate sections of the federal antitrust laws.

Petitioners' Amended Complaint named fifteen defendants, including the Federal Reserve Board, the Federal Reserve Bank of Cleveland, and the seven directors of the Federal Reserve System. It also named the six Respondent Banks, all located in Cincinnati, Ohio, as defendants. Petitioners do not and cannot allege that either of them has had dealings with any of the Respondent Banks other than Provident Bank.

In short, Petitioners' Amended Complaint makes shotgun allegations that Regulation Q violates the federal Constitution and that the Respondent Banks, only one of which has dealt with Petitioners, are liable to thousands of depositors under a melange of theories and statutes because each bank has complied with Regulation Q.

Each Respondent Bank moved to dismiss all counts of the Amended Complaint. On July 16, 1974, for the reasons stated in a carefully researched thirty-three page Opinion, the District Court dismissed each of Petitioners' claims for failure to state a claim upon which relief could be granted.[3] Petitioners appealed the dismissal of each count to the United States Court of Appeals for the Sixth Circuit. In a per curiam Opinion filed on May 8, 1975, that Court affirmed the District Court's dismissal of each count of the Amended Complaint.

Petitioners now abandon the numerous strained claims they made below under the federal securities laws and federal antitrust laws, but ask this Court to review the Sixth Circuit's determination that Regulation Q is constitutional and that Respondent Banks' compliance therewith does not violate Petitioners' civil rights.

---

[3] By letter of July 16, 1974 to the parties the District Court invited Petitioners to further amend their Amended Complaint, if Petitioners believed that by such amendments they could state a claim for relief. Petitioners declined the Court's invitation.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Court of Appeals Correctly Decided That Regulation Q Constitutes Social and Economic Regulation Which Rationally Serves Legitimate Ends and Is Therefore Constitutional.

Petitioners' Amended Complaint asserted that Regulation Q, which prescribes no maximum interest rate for certificates of deposit of over $100,000 but maintains maximum rates for smaller deposits, deprives those having deposits of under $100,000 of equal protection of the laws. Both the District Court and Court of Appeals held that Regulation Q is in the area of social and economic regulation and is to be judged by the rational basis test. (App. A at 11a-12a; App. B at 42a.) Finding that the Regulation serves legitimate goals and that the separate classification of certificates of deposit in excess of $100,000 is rationally related to those goals, each court upheld the constitutionality of Regulation Q. (App. A at 12a-16a; App. B at 42a.)

Giving the most charitable reading to the Petition for Certiorari,[4] it may be said to argue that the Court of Appeals' decision to uphold Regulation Q conflicts with decisions of this Court in two respects. First, Petitioners apparently complain that Regulation Q contains a "suspect classification" based upon wealth which the Court of Appeals should have tested under a standard more stringent than the rational basis test. (Pet. at 5-6.) Second, Petitioners apparently urge that if Regulation Q is to be

[4] Respondent Banks have difficulty understanding Petitioners' reasoning as set forth in the Petition. Petitioners argue that wealth is a suspect classification and therefore the standard of *Richardson* v. *Belcher*, 404 U.S. 78 (1971), should apply. (Pet. at 7) *Richardson* v. *Belcher*, however, involved social legislation tested under the rational basis test and did not involve a suspect classification. *Id.* at 81.

measured by the rational basis test, then the Court of Appeals misapplied that test. (Pet. at 7.)

(A) Regulation Q Involves Neither a Suspect Classification Nor a Fundamental Right and Was Properly Tested Under the Rational Basis Test.

To support the claim that Regulation Q should be subject to stringent scrutiny, Petitioners start from the premise that Regulation Q contains a classification based upon wealth and then assert that "This Honorable Court has established that wealth is a suspect classification." (Pet. at 5.) Not only do Petitioners postulate an incorrect premise, they clearly misapprehend the holdings of this Court. In *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), the Court noted:

> [T]his court has never heretofor held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny. . . . *Id.* at 29.

Far from holding that all legislative classifications involving some ability to pay are inherently suspect, this Court has often held that such legislation does not "touch upon . . . the suspect criteria of race, nationality, or alienage." *United States* v. *Kras*, 409 U.S. 434, 446 (1973); *e.g. Schlib* v. *Kuebel*, 404 U.S. 357 (1971). Petitioners misconstrue the decisions of this Court in claiming classifications involving wealth are suspect. The lower courts herein correctly applied the precedents of this Court by refusing to hold that wealth is a suspect classification.

Petitioners misinterpret several decisions of this Court in making the insupportable assertion that the Court has established wealth as a suspect classification. In the cases cited by Petitioners, this Court has held that a state may

not condition the exercise of a *fundamental right* upon the ability to pay. *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969) (right to vote); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote); *Douglas* v. *California*, 372 U.S. 353 (1964) (right to counsel); *Shapiro* v. *Thomasson*, 394 U.S. 618 (1969) (right to travel between states).

The lower courts here determined that Regulation Q involves no fundamental right, but merely regulates the rate of return on deposits. (App. A at 11a; App. B at 42a.) Petitioners do not challenge this determination which is supported by several decisions of this Court. *E.g. United States* v. *Kras*, 409 U.S. 434, 446 (1973) (bankruptcy discharge not a fundamental right); *Schlib* v. *Kuebel*, 404 U.S. 357 (1971) (amount of bail returnable to criminal defendant not a fundamental right). Petitioners widely miss the mark in asserting that all legislative classifications based upon wealth are suspect and to be strictly scrutinized.

Furthermore, Petitioners start their analysis with the faulty premise that Regulation Q contains a classification based upon wealth. Regulation Q does prescribe different treatment for deposits of less than $100,000, but persons having bank deposits of less than $100,000 cannot reasonably be said to constitute a class which is capable of being defined in terms of wealth. Petitioners concede that their alleged class is a heterogeneous mix of "poor and middle-class citizens." (Pet. at 7.) In fact, even extremely wealthy persons must be among those having bank deposits of less than $100,000. The classification of Regulation Q does not single out indigents, does not divide rich and poor, and is in no sense based upon wealth at all. Indeed, Petitioners' allegedly disadvantaged class comprises a larger, more diverse, and more amorphous group than the class involved

in *San Antonio Independent School District* v. *Rodriguez*, which the Court found incapable of being identified "in customary equal protection terms." 411 U.S. 1, 19 (1973).[5]

Petitioners cannot show that in affirming the District Court's order the Court of Appeals deviated from this Court's decisions. Regulation Q does not classify persons on the basis of wealth, and even if it did, wealth is not a suspect classification. The lower courts properly determined that Regulation Q involves social and economic matters and, in accord with a long line of decisions by this Court, is to be tested under the rational basis test. *E.g. Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

(B) The Court of Appeals Correctly Applied the Rational Basis Test.

In asking a review of the Court of Appeals decisions, Petitioners also urge that the rational basis test consists of two prongs—(1) that there be a rational basis for the regulation and (2) that it "not result in insidious (sic) discrimination." (Pet. at 7.) It is further urged that the lower courts herein erred by applying only the first prong of this test and ignoring the second.

Here, as is the case with their other contentions, it is the Petitioners, rather than the lower courts, who have misconstrued this Court's decisions. This Court has repeatedly defined the rational basis test in the following terms:

---

[5] Petitioners are not and cannot claim to be suffering an absolute deprivation of the desired benefit. They receive interest and are capable of investing their funds elsewhere at a higher rate of return. Without an absolute deprivation, there is no basis for invoking a more stringent standard in testing Regulation Q. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 19-20 (1973).

> The constitutional standard of the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. at 55.
>
> If the goals sought are legitimate and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment. *Richardson* v. *Belcher*, 404 U.S. at 84.
>
> If the classification has some "reasonable basis," it does not offend the Constitution. . . . *Dandridge* v. *Williams*, 397 U.S. at 485.

The foregoing standard was correctly applied by both the District Court and the Court of Appeals. (App. A at 11a-16a; App. B at 42a.)

Petitioners seize upon this Court's use of the phrase "invidious discrimination" in cases such as those cited above to suggest that some further examination of Regulation Q must be made. Petitioners offer no explanation as to the nature or scope of the additional inquiry which they seek.[6] A review of the decisions of this Court indicates that the Court has used invidious discrimination as a synonym for the rational basis test. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. at 17; *Schlib* v. *Kuebel*, 404 U.S. at 365. The phrase suggests no additional areas of judicial scrutiny in testing legislative classifications.

---

[6] Petitioners suggest in conclusory terms that the classification of Regulation Q is "arbitrary" and thereby becomes invidious. (Pet. at 7.) If the classification were truly arbitrary, it would necessarily lack rationality and thereby fail to satisfy the test as enunciated by this Court. Thus, Petitioners' own reasoning suggests that the phrase "invidious discrimination" is but a synonym for the rational basis test.

In this case the District Court made an exhaustive review of the history of the 1966 amendments to the Federal Reserve Act and of the Federal Reserve Board actions thereunder. (App. A at 8a-16a.) Without going into detail, the Court determined that Congress authorized the Federal Reserve Board to establish different rates of interest for different amounts on deposit so that competition between banks and thrift institutions could be controlled to protect the flow of funds to the home mortgage market, while at the same time permitting banks to compete for large denomination, money market certificates of deposit. (App. A at 12a-15a.) The District Court further found that Regulation Q's limitation of interest payable on deposits under $100,000 is rationally related to the legitimate goal of protecting the flow of funds to thrift institutions (App. A at 13a-14a), and that the removal of interest limitations for deposits of $100,000 or more rationally serves the legitimate goal of permitting banks to attract funds and thereby provide liquidity to businesses. (App. A at 14a-16a.)

The Court of Appeals concurred that Regulation Q is rationally supported in that it "prevents unfair competition for savings accounts and helps to regulate the country's monetary flow." (App. B at 42a.)

The lower court decisions clearly show that each court measured Regulation Q against the standards established by this Court and ascertained that it rationally served legitimate goals. Petitioners ignore that analysis, preferring instead to invoke catch phrases such as "insidious discrimination" which they do not even define. Petitioners offer no sound reason why this Court should review the Court of Appeals decision herein.

II. The Standard for Determining "State Action" Which Petitioners Suggest Was Rejected by This Court During Its Last Term and There Is No Reason for the Court Again to Review This Question.

Petitioners ask this Court to review the question whether Respondent Banks' compliance with federal Regulation Q constitutes state action under 42 U.S.C.A. § 1983. (Pet. at 3.) In logic, to ask the question is to answer it negatively. However, Petitioners' Amended Complaint does allege that conducting a banking business in accord with federal law constitutes state action. Respondent Banks urged the absence of state action as one ground for dismissing Petitioners' civil rights claim.

In upholding the dismissal of Petitioners' civil rights claim, the Court of Appeals found it unnecessary to decide whether compliance with federal law is an act of the State of Ohio. It held that since Regulation Q is constitutional, Petitioners could not allege deprivation of a constitutional right, a necessary element of a claim under the Civil Rights Act of 1871. (App. B at 42a.) In accordance with that holding, unless this Court is prepared to declare Regulation Q unconstitutional, no basis exists for considering the state action issue which Petitioners pose.

In addition, the standard for "state action" which Petitioners urge does not merit the consideration of this Court. Petitioners cannot show that the state of Ohio is a participant in the discrimination they allege. It is federal regulation which prevents Respondent Banks from paying higher interest on deposits of less than $100,000.[7] In their endeavor

---

[7] Unanimous authority establishes that acts of the federal government do not constitute "state action" for the purposes of 42 U.S.C.A. § 1983. *Williams* v. *Rogers*, 449 F.2d 513, 517 n.7 (8th Cir. 1971) (and cases cited therein); *Stinson* v. *Finch*, 317 F. Supp. 581, 585-86 (N.D. Ga. 1970).

to bridge the unbridgeable gulf between compliance with an exclusively federal regulation and the state action prerequisite to a Civil Rights Act claim, Petitioners claim that Respondent Banks are subject to extensive state regulation, and ask this Court to adopt a standard under which pervasive state regulation of an entity would make every act of that entity state action.

During its most recent term, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), this Court refused to adopt the standard Petitioners now suggest:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . . Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. . . . [T]he inquiry must be whether there is a sufficiently close nexus between the State and the *challenged action* . . . so that the *action* . . . may be fairly treated as that of the State itself. *Id.* at 350-51. (Emphasis added.)

This Court and other courts have held previously that the presence of state regulation does not make every act of the regulated entity state action.

> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-77 (1972).

> It overlooks the essential point—that the State must be involved not simply with some activity of the institution . . . but with the activity that caused the injury. *Powe* v. *Miles*, 407 F.2d 73, 81 (2d Cir. 1968). *See also Jackson* v. *Norton-Childrens' Hospitals, Inc.*, 487 F.2d 502 (6th Cir. 1973); *Doe* v. *Bellin Mem. Hosp.*, 479 F.2d 756, 761 (7th Cir. 1973).

Thus, inasmuch as the standard for determining state action which Petitioners suggest has been thoroughly rejected,[8] there is no reason to review that standard again.

CONCLUSION

Viewing the considerations governing review on certiorari set forth in Rule 19 of the Supreme Court Rules, Petitioners have wholly failed to suggest any "special and important reasons" for granting the Petition. Apparently, the sole factor enumerated in Rule 19 upon which Petitioners rely is a claim that the decision of the Court of Appeals conflicts with applicable decisions of this Court. The preceding analysis indicates, however, that it is Petitioners, rather than the Court of Appeals, who misconstrue this Court's decisions. The Court of Appeals correctly perceived that this Court has not made wealth a suspect classification and that Regulation Q, concerning social and economic matters, is constitutional because it rationally serves legitimate goals. Likewise, there is no merit to reviewing the state action question Petitioners pose. The Court has already rejected the standard Petitioners suggest, and resolution of the question is unnecessary to disposition of this case in any event.

This case presents no new issues. The Court of Appeals applied often-enunciated and well-defined standards of this Court to dismiss a shotgun Amended Complaint which sought to hold six banks (including five banks who had never dealt with Petitioners) and others liable to thousands

---

[8] The cases upon which Petitioners principally rely were distinguished in *Jackson* on the basis that in those cases the state had actually fostered the challenged action. In this case, the state has nothing to do with the challenged action.

of depositors because these banks conduct their banking business in compliance with Regulation Q. The Petition should be denied.

Respectfully submitted,

/s/ JOHN A. LLOYD, JR.

JOHN A. LLOYD, JR.

Attorney for Respondent,
Central Trust Company
2900 DuBois Tower
Cincinnati, Ohio 45202

/s/ J. MACK SWIGERT

J. MACK SWIGERT

/s/ ROBERT G. STACHLER

ROBERT G. STACHLER

Attorneys for Respondent,
The First National Bank of Cincinnati
600 Dixie Terminal Building
Cincinnati, Ohio 45202

/s/ WILLIAM R. HARDY, JR.

WILLIAM R. HARDY, JR.

Attorney for Respondent,
Fifth Third Bank
1900 Fifth Third Center
Cincinnati, Ohio 45202

/s/ LOUIS F. GILLIGAN

LOUIS F. GILLIGAN

Attorney for Respondent,
Provident Bank
18th Floor Provident Tower
Cincinnati, Ohio 45202

/s/ THOMAS L. CONLAN

THOMAS L. CONLAN

Attorney for Respondent,
Southern Ohio Bank
1313 Provident Tower
Cincinnati, Ohio 45202

/s/ ROBERT J. IMBUS, JR.

ROBERT J. IMBUS, JR.

Attorney for Respondent,
North Side Bank and Trust Co.
711 Gwynne Building
Cincinnati, Ohio 45202

ADDENDUM OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV
§ 1

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Reserve Act § 19(j)
12 U.S.C.A. § 371b (Supp. 1975)

§ 371b. Rate of interest on time deposits; payment of time deposits before maturity; waiver of notice requirements for withdrawal of savings deposits

The Board may from time to time, after consulting with the Board of Directors of the Federal Deposit Insurance

Corporation and the Federal Home Loan Bank Board, prescribe rules governing the payment and advertisement of interest on deposits, including limitations on the rates of interest which may be paid by member banks on time and savings deposits. The Board may prescribe different rate limitations for different classes of deposits, for deposits of different amounts or with different maturities or subject to different conditions regarding withdrawal or repayment, according to the nature or location of member banks or their depositors, or according to such other reasonable bases as the Board may deem desirable in the public interest. No member bank shall pay any time deposit before its maturity except upon such conditions and in accordance with such rules and regulations as may be prescribed by the said Board, or waive any requirement of notice before payment of any savings deposit except as to all savings deposits having the same requirement: *Provided*, That the provisions of this section shall not apply to any deposit which is payable only at an office of a member bank located outside of the States of the United States and the District of Columbia. During the period commencing on October 15, 1962, and ending on October 15, 1968, the provisions of this paragraph shall not apply to the rate of interest which may be paid by member banks on time deposits of foreign governments, monetary and financial authorities of foreign governments when acting as such, or international financial institutions of which the United States is a member.

REGULATION Q
12 C.F.R. § 217.7

§ 217.7 Maximum rates of interest payable by member banks on time and savings deposits.

Pursuant to section 19 of the Federal Reserve Act and § 217.3 hereof, the Board of Governors of the Federal Reserve System hereby prescribes the following maximum

rates [1] of interest per annum payable by member bank of the Federal Reserve System on time and savings deposits:

(a) *Time deposits of $100,000 or more.* There is no maximum rate of interest presently prescribed on any time deposit of $100,000 or more.

(b) *Time deposits of less than $100,000.* (1) Except as provided in paragraphs (a) and (d) and subparagraphs (2) and (3) of this paragraph, no member bank shall pay interest on any time deposit at a rate in excess of the applicable rate under the following schedule:

Maturity:	*Maximum percent*
30 d or more but less than 90 d	5
90 d or more but less than 1 yr	5½
1 yr or more but less than 30 mo	6
30 mo or more	6½

(2) Member banks may pay interest on any time deposit of $1,000 or more, with a maturity of four years or more, at a rate not to exceed 7¼ percent.

(3) Investment Certificates—Member banks may pay interest on any time deposit of $1,000 or more, with a maturity of six years or more, at a rate not to exceed 7½ percent.

(c) *Savings deposits.* No member bank shall pay interest at a rate in excess of 5 percent on any savings deposit including savings deposits that are subject to negotiable orders of withdrawal, the issuance of which is authorized by Federal law.

(d) *Governmental unit time deposits of less than $100,000.* (1) Except as provided in paragraph (a) of this section, no member bank shall pay interest on any time deposit which consists of funds deposited to the credit of, or in which the entire beneficial interest is held by, the United States, any State of the United States, or any county, municipality, or political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico,

the Virgin Islands, American Samoa, Guam, or political subdivision thereof, at a rate in excess of the highest of any of the permissible rates that can be paid on time deposits under $100,000 by any Federally insured commercial bank, mutual savings bank or savings and loan institution.[2]

[Reg. Q, 38 FR 29461, Oct. 25, 1973, as amended at 38 FR 34457, Dec. 14, 1973; 39 FR 43056, Dec. 10, 1974; 39 FR 43618, Dec. 17, 1974]

Civil Rights Act of 1871
42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

AFFIDAVIT

STATE OF OHIO }
COUNTY OF HAMILTON } ss:

The undersigned, being first duly sworn, deposes and says that he is attorney of record for Respondent, The First National Bank of Cincinnati, and that on behalf of that bank and each other Respondent Bank herein, he served on August 28, 1975, three copies of the foregoing Brief of the Respondent Banks in Opposition to the Petition for Certiorari upon each other party separately represented in these proceedings by depositing the same in a United States mail box, with first-class postage prepaid, addressed to counsel of record for each such party, respectively, at the respective post office addresses of such coun-

sel. Three copies were similarly served on August 28, 1975, upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ ROBERT G. STACHLER

ROBERT G. STACHLER

Sworn to and subscribed before me, a notary public for the State of Ohio, on this 28th day of August, 1975.

/s/ TIMOTHY E. HOBERG

Notary Public

My commission does not expire.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-242

DONALD K. GEARHEART AND
RICHARD KURTZ, PETITIONERS

v.

FEDERAL RESERVE BANK OF CLEVELAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners purchased certificates of deposit in face amounts of $10,000 at the respondent Provident Bank. The rate of interest allowed on their certificates was limited by Regulation Q of the Federal Reserve Board, 12 C.F.R. 217.7, which imposes a maximum rate of interest on certificates of deposit of less than $100,000 purchased at member banks.

After their purchase, petitioners instituted this action in the United States District Court for the Southern District of Ohio, challenging the validity of Regulation Q on the ground that the imposition of

interest limitations only as to smaller certificates of deposit denies due process. The complaint also claimed that compliance with Regulation Q by the nonfederal respondents[1] violates 42 U.S.C. 1983 and 1985(3), as well as several sections of the federal securities laws and federal antitrust laws (see Pet. App. A, pp. 2a–8a). The district court dismissed petitioners' complaint with prejudice for failure to state a claim upon which relief can be granted (Pet. App. A, pp. 1a–39a). The court of appeals affirmed *per curiam* (Pet. App. B, pp. 40a–43a). Petitioners reiterate their principal claims here.

1. Petitioners contend that Regulation Q contains a "suspect classification" based on wealth (Pet. 5). But, as petitioners apparently concede (Pet. 6–7), the appropriate standard of review must focus on whether the classification has a reasonable basis. This Court has never held that statutes bearing on the wealth of an individual are by that fact alone subject to strict judicial scrutiny. See *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 29. The cases in which this Court has strictly scrutinized classifications based on wealth dealt with statutes that conditioned the exercise of a fundamental right on the ability to pay for it. See *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802; *Shapiro* v. *Thompson,* 394 U.S. 618; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663; *Douglas* v. *California,* 372 U.S. 353. Regulation Q's limitation on rates of interest does not burden the exercise of any fundamental right (see Pet. App. B,

[1] The respondent banks are members of the Federal Reserve System required to comply with Regulation Q.

p. 42a). The regulation therefore must be sustained if it is "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487; see *Richardson* v. *Belcher*, 404 U.S. 78, 81; cf. *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

The court of appeals was correct in holding (Pet. App. B, p. 42a) that Regulation Q is rationally based. Regulation Q is designed to control competition for deposits between banks and savings and loan institutions so as to insure a flow of funds to the home mortgage market while at the same time permitting banks to attract funds needed to service commercial borrowers (Pet. App. A, pp. 12a–16a; Pet. App. B, p. 42a). This is a legitimate and permissible goal, and Regulation Q is a well-tailored means to that end.

Petitioners appear to concede that Regulation Q is rationally based (see Pet. 7). But they contend that the courts did not consider whether the regulation was invidious. The district court did address the question, however, and correctly determined that petitioners' allegations of invidious discrimination were conclusory and factually unsupportable (Pet. App. A, pp. 17a–18a). The district court's careful survey of the administrative history of Regulation Q revealed no evidence of an impermissibly discriminatory intent.

2. Petitioners also contend that compliance with Regulation Q by respondent banks is a deprivation under color of state law of the constitutional rights of purchasers of certificates with face values less than $100,000 (Pet. 8). This claim fails for two reasons. First, since Regulation Q is not unconstitutional, compliance with its requirements is perforce not a depri-

vation of constitutional rights (see Pet. App. A, p. 18a; Pet. App. B, p. 42a). Second, compliance with Regulation Q is not under color of state law. Regulation Q is a federal regulation, and this Court has held that the relevant inquiry in this regard is "whether there is a sufficiently close nexus between the State and the challenged action * * * so that the action * * * may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.* 419 U.S. 345, 351. Detailed and extensive regulation of the banking industry by the states, such as petitioner has shown (Pet. 9–11), is not by itself sufficient to convert all bank activities into acts taken under color of state law. See *Jackson* v. *Metropolitan Edison Co., supra; Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975